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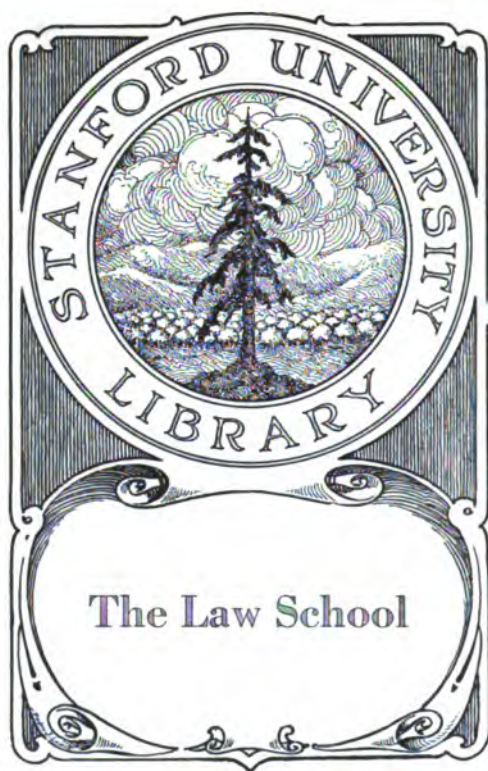
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AMERICAN AND ENGLISH
DECISIONS IN EQUITY.

BEING

**SELECT CASES DECIDED IN THE AMERICAN AND
ENGLISH COURTS WITH NOTES.**

ANNUAL

VOLUME I. FIRST SERIES.

NOTES BY

HENRY BUDD, Esq.,

Of the Philadelphia Bar.

PHILADELPHIA:

M. MURPHY,

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PREFACE.

The object of the series of reports of which this is the **first** volume, is to present annually a selection of the best **cases** in equity decided in the courts of the United States and **Great Britain** during the year immediately preceding the **date** of the volume. Such a selection of cases becomes the more important in this country from the fact that in most of the States the same tribunals have for many years administered both law and equity, and in some places without much variation of form. Therefore, except with regard to a very few States, it is no longer possible to turn at once to distinct equity reports; and yet equitable principles are as potent as ever, and their application must be sought throughout the myriads of cases annually decided without much reference to the labels on the backs of the books in which they appear. This is even more the case than ever now when England, following the example set by Pennsylvania a century or more ago, has practically fused law and equity. It will be seen, therefore, that the scope of equity is, if not more important than formerly, at least more widespread, and equitable principles appear actively at work under forms which in bygone days they

never would have assumed. Any book, therefore, which gives to the hard-worked man the gist of many books, cannot fail to be of use to him ; and a work coming out annually, and properly annotated, must be of service in keeping the lawyer *au courant* with a branch of law which is every day becoming more important.

The cases contained in this volume were in the main selected by the gentleman who was to have acted as editor of this series of what it is hoped will be regarded by the profession as interesting and valuable reports, and who was prevented by unforeseen circumstances from completing the work he had undertaken. At the request of the publisher I undertook the completion of the first volume only, and have, therefore, appended short notes to the cases which came to me, and have added a few cases which seemed to be of interest.

HENRY BUDD.

PHILADELPHIA.

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AMERICAN AND ENGLISH DECISIONS IN EQUITY.

**Attorney and client—Assignment of chose in action—
Statute of limitations—Laches.**

SUTHERLAND v. REEVE.

(Supreme Court of Illinois, March 31, 1894.)

[Reported 151 Illinois, 384.]

A solicitor cannot secretly purchase the subject-matter in litigation, or any interest therein, and hold the same adversely to his client. Such a purchase is voidable as to his client.

If he do so purchase, he will be held to be a trustee for his client as to the property or interest so purchased. The purchase of the subject-matter of litigation is forbidden as against public policy, and because it places the solicitor under temptation to be unfaithful to his trust.

Where an attorney, without notice to his client, procured an order or judgment that the claim in litigation belonged to the attorney, and that the suit proceed for the benefit of the latter, it was held the decree or order finding the attorney to be the sole owner of the claim, was improperly and fraudulently entered.

In a court of equity a *cestui que use* may avail himself of all the defenses of which the trustee could.

A purchaser of a claim, which is not negotiable, can only acquire such interest as the vendor has. He will take the claim subject to the equities between the vendor and a third person claiming the equitable title.

Not only does any purchaser of a chose in action take it subject to all equities of the original parties thereto, but a second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee.

An attorney concealed material facts respecting his client's claim, and thereby obtained an assignment of the claim, which, if known to the assignor, he would not have obtained: *Held*, that concealment, under the circumstances, vitiated the assignment as much as misrepresentation or actual fraud.

The statute of limitations is applied in equity only by analogy to the limitations at law, and a court of equity will not apply the statute when it would be inequitable to do so. The limitation of five years will not be applied to a bill to set aside an order obtained by fraud, while the original cause is still pending.

The defense of laches, by reason of lapse of time and inaction of the party seeking relief, will not be permitted where the party was in ignorance of the material facts connected with the transaction which is attacked or of his rights in relation thereto.

Appeal from the Appellate Court for the First District, heard in that court on writ of error to the Circuit Court of Cook county.

Appeal from Appellate Court, First District.

Bill of review by Selah Reeve against Thomas J. Sutherland.

The cause was heard on a bill of review before the Honorable MURRAY F. TULEY, Chancellor, who rendered the following opinion:

"The bill alleges that about February, 1874, he (Reeve) retained Sutherland as his solicitor to attend to and collect the claim of Reeve against the Great Western Telegraph Company for a reasonable compensation to be paid out of the proceeds of the claim when collected, and that up to the filing of the petition in this case Sutherland continued to be his solicitor in said matter. That, in 1876, David A. Gage, who it appears was a friend of Reeve's, and had been presi-

dent of the telegraph company, came to Reeve, and stated that there was a move to sell the Great Western Telegraph Company to the Western Union, and requested Reeve to assign his claim to him (Gage), so that he could show that he had a right to control the same, and thereby the sale of the lines of the Great Western Telegraph Company to the Western Union could be accomplished, in which event Reeve would get the money on his claim: if no sale could be made, he (Gage) would return the assignment to him (said Reeve). That he (Reeve) thereupon made a written assignment to Gage, of his said claim. That no sale was made to the Western Union, but Gage did not return the assignment to Reeve. That in 1879 Sutherland went to Denver, where Gage had been living for a number of years, and obtained the assignment of the claim to himself, upon the representation that he was the attorney of Reeve, and upon the false representation that Reeve had authorized him to take and receive from Gage an assignment of the said claim. That thereupon, and on the 7th of August, 1879, Sutherland appeared in court in the Terwilliger case, and moved the court that the accounting by and between Reeve and the Great Western Telegraph Company, then pending, be henceforth carried on, and be prosecuted on the part of said Reeve for the use and benefit of himself (Sutherland), which motion was signed 'Thos. J. Sutherland, solicitor of record for Selah Reeve, and the owner of the claim of Selah Reeve against the Gt. West. Tel. Co.' That the court thereupon entered an order to the effect that Sutherland was the owner of the claim, and that the same be prosecuted for his use and benefit. That no notice was given Reeve of the filing of the motion, the pendency thereof, or of the order therein. That on September 29, 1879, a decree was entered in the Terwilliger case on the report of the master to whom the case was referred to take proof as to the claim of said Reeve, finding and decreeing a claim in favor of Reeve for \$154,861.25. The bill alleges that visible property of the company was sold

by the order of this court in 1880 for the sum of \$15,000; which petitioner supposed, from information derived from Sutherland, exhausted all property and assets of the corporation liable for the payment of its debts and the costs of the court proceeding. That there was, in fact, an unpaid stock liability to an amount more than sufficient to pay in full petitioner's claim, which fact it is alleged Sutherland studiously concealed from Reeve. That Reeve did not learn of the action of the court in adjusting the ownership of his claim to Sutherland, nor of the assignment by Gage to Sutherland of his claim, until February 1, 1888. The prayer of the bill is to impeach and to have set aside the order which finds Sutherland to be the owner of the Reeve claim, and that it be prosecuted for his benefit, and also so much of the decree of September 29, 1879, as finds and decrees to the same effect, and that the proceeds of the claim be paid to Sutherland; also for general relief. An answer under oath is not waived.

"The answer. An answer under oath was required, and was filed by Sutherland. It had been twice or more amended, and one of the amendments put in without being sworn to. It is a serious question whether that does not make the entire answer as of no more value than if it were not an answer under oath. In the view I take of this case, it is unnecessary to decide that question. It is sufficient to say that the answer carefully denies all the allegations of fraud or misconduct.

"The defense set up by the answer. It admits the employment as attorney and solicitor to collect the claim, but avers that it was agreed that he was to have one-half of the claim as compensation, which Reeve should shortly assign to him, which he never did. Admits that he (Sutherland) acted as Reeve's attorney from February, 1874, until May, 1875, and alleges that he has never since represented Reeve, or claimed to represent him, in said litigation, or about the prosecution of the claim. Admits the motion

and order therein that the claim of Reeve be prosecuted for his benefit, and that no notice thereof was given said Reeve, and alleges notice unnecessary, as Reeve then had no interest in claim, and he (Sutherland) was by purchase and assignment the owner thereof. Alleges Reeve had personal knowledge and notice of the order in the said month of August, 1879, and charges laches by acquiescence from then until he filed this petition in 1889; also that Reeve, shortly after entry of final decree of September 29, 1879, knew of same. Alleges that Reeve gave no attention to the claim from July, 1876, and was not represented by counsel, and had no need to be, as he had no ownership in claim. That Reeve had no money, and paid none to his attorney. That defendant was continuously occupied, during the year 1874, before the master in the prosecution of the claim. That it became necessary for Reeve to raise money, and in order to do so he entered into an agreement in writing, dated October 12, 1874, with the McMullen Bros., by which he sold them an undivided 52½ per cent. of said claim (and of any decree to be obtained thereon), after deducting all advances they might make Reeve. That they advanced said Reeve about \$7,000. That defendant did not know the contents of the McMullen agreement until 1879. That the master in this case, about December, 1874, reported in favor of Reeve's claim to the amount of \$154,000. Objections were filed, and a few months thereafter Reeve, in fraud of defendant's and of the McMullens' rights, attempted to sell said claim; discovering which, defendant filed a bill in equity in this court to compel Reeve to assign him a portion of said claim, as provided by the retainer of said defendant. That Reeve became angry, and thereafter refused to have any communication, oral or written, with the defendant, and immediately discharged defendant as his solicitor, and filed in the case a written discharge to that effect. That because of said discharge, and the refusal of complainant to have any communication with defendant, he (defendant), from and after May,

1875, ceased to act as his solicitor, and has never since so acted, or pretended so to act, or to represent said Reeve or his interest therein. That with but one exception Reeve has never since spoken to defendant, and has never since been in his office, although said Reeve was in the city of Chicago constantly up to and during the year 1878. That since said month of May, 1875, Reeve neglected and abandoned said claim, and refused to prosecute the same, because he believed there was no prospect of success, and gave no further attention to the same, and because he had sold and assigned the said claim on July 28, 1876, for value, to David A. Gage, the assignment providing that Gage was to protect Reeve against the McMullen claim, McDonald & Whitcomb, and the rights and claim of the defendant, and against all costs. That about October 23, 1876, this court was about to proceed with the hearing of the objection to the master's report, and, the defendant being notified thereof, went to the court, and stated that he no longer represented Reeve, and suggested a continuance until he could notify Reeve or his friends. The hearing being continued, the defendant wrote to Gage, who he supposed could reach Reeve, stating the action of the court. That on the 25th of October, 1876, Gage came to defendant, said he had purchased Reeve's claim, exhibited the assignment thereof, and offered to assign the defendant one-half of the claim in payment of his services in and about the prosecution of the claim, which offer defendant accepted. That thereupon, by authority of said assignment to him (said Gage), and in consideration of such services, Gage assigned defendant an undivided half-interest of the claim. That about two weeks after the assignment defendant met Reeve on the street, told him he had seen the assignment, and that Gage had assigned him one-half of the claim. That Reeve replied he did not care what Gage did; he was going for the telegraph lines. That thereafter Reeve paid no attention to said claim, nor did he thereafter communicate with said Sutherland. That

defendant, on May 31, 1879, purchased for value from the said McMullen Brothers all their title and interests in the claim, and obtained for value an assignment of the agreement between them and Reeve; also that defendant purchased and owned the claim of McDonald & Whitcomb against Reeve. Alleges that by the purchase from Gage in 1876 of an undivided half, and of the McMullen interest in May, 1879, he became the owner of all said claim. Defendant alleges that September, 1878, Gage was adjudged a bankrupt, and one Mason B. Carpenter was appointed assignee, and that Gage conveyed to him all his property, including the interest in this claim. That on August 1, 1879, Carpenter, assignee, in pursuance of petition filed, and orders thereon of the United States District Court at Denver, Colorado, did sell, assign and transfer to defendant, for a valuable consideration, all the title of said Gage to said claim then owned by him; and defendant received from said assignee a deed of assignment thereof. That Gage well knew of the bankruptcy proceedings, and acquiesced, advised and consented thereto. That on the 9th of August, 1879, defendant mailed a letter to Reeve, duly registered, which Reeve refused to receive. That on or about the 12th of August, 1879, he caused to be served on said Reeve a copy of said letter by the sheriff at Cuyahoga Falls, Ohio. That although Reeve knew by said copy that defendant was asserting ownership of said claim, based largely, if not entirely on said assignment to Gage, he never made any protest or objection, or communicated with defendant concerning the same. That, believing himself to be the owner, he spent much money and labor in the prosecution of the claim, and finally succeeded in obtaining a decree allowing the same, the same to be paid to him, said defendant. That since July, 1876, both Gage and Reeve considered the claim as of but little, if of any, value until within a year past. That practically all of the value has resulted from defendant's labors and services. The

doctrine of laches is invoked and relied upon as a complete defense. An amendment to the answer sets up the statute of limitations of five years as a bar, and alleges that Reeve was not the owner of the claim; that assignment of parts thereof had been made to his son and other persons; and that defendant has assigned an interest in the claim to other persons, but to whom it does not state.

"I have stated the proceedings at length, for the reason that I have arrived at the conclusion that, except for two disputed facts, this case might be decided upon the petition and sworn answer. Those two facts are: First, whether or not, after May, 1875, the defendant was or acted as the solicitor of Reeve in the prosecution of this claim; and, second, did Reeve make the assignment, in 1876, of this claim in question to Gage in trust and for the purposes alleged in the petition? I desire to say as little as possible in deciding this case. It is always a disagreeable duty for a court to pass upon any question in which a solicitor of the court appears to be involved professionally, and I know also that a solicitor's reputation responds more sensitively to attack than any other, except possibly a woman's. I shall take up the question first of Reeve's assignment to Gage. I find from the evidence that the assignment to Gage was without consideration, was in trust, and for the purposes alleged in the petition. The defendant claims title through Gage, except as to one undivided $52\frac{1}{2}$ per cent. thereof, to which he claims an independent title by purchase from McMullen Bros. The McMullen claim was purchased by him after the assignment by Reeve to Gage, and before the purchase by defendant of Gage's assignee in bankruptcy. If the defendant was not Reeve's solicitor, he was certainly Gage's. If defendant, while acting as Reeve's solicitor, derived knowledge of the McMullen claim, and neither Reeve nor Gage had notice of the purchase of the McMullen's interest by defendant until after it was purchased—which the evidence shows to be the fact—it needs no citation of

authority to show that a solicitor cannot secretly purchase the subject-matter in litigation, or any interest therein, and hold it adversely to his client. It was a voidable purchase, either as to Gage or as to Reeve: Weeks, Attys. 465, §§ 222, 223; Gibbons v. Hoag, 95 Ill. 45. If he does so purchase, he will be held to be a trustee for his client as to the property or interest so purchased. The purchase of the subject-matter of litigation is forbidden as against public policy, and because it places the solicitor under temptation to be unfaithful to his trust. There was a quasi lien of one McDonald & Whitcomb purchased by defendant. What has been said of the McMullen purchase will equally well apply to that purchase. If defendant's title through the McMullen Bros. and the McDonald & Whitcomb purchase was not good as against Gage, it could not be good against Reeve, as I have found Gage held only in trust for Reeve. In a court of equity, a *cestui que use* may avail himself of all the defenses of which the trustee could. This brings us to the consideration of defendant's claim of title derived from or through Gage. He claims to have received an assignment of an undivided half from Gage in 1876, and of all Gage's title remaining in him by deed of the assignee in bankruptcy in 1879. The petition alleges a transfer to Sutherland of the assignment made to Gage; that this took place in 1879, at Denver. The defendant denies this, but admits he did obtain, by Gage's consent, from Gage's assignee in bankruptcy, an assignment of all of Gage's interest. I am of the opinion from the evidence that Gage did assign the original assignment from Reeve to him over to Sutherland at that time. But whether Sutherland thus acquired Gage's title, or whether he acquired it through the deed or transfer of the assignee in bankruptcy is immaterial. In either case he could only acquire such interest as Gage had; or, in other words, in either event he took subject to all the equities between Gage and Reeve. The defendant bases

his claim of title upon the agreement of McMullen and the assignment of Gage, and claims that he had a right to buy such titles as those instruments purported to convey. In other words, he claims to be a *bona fide* purchaser for value without notice of equities, from both McMullen and Gage's assignee in bankruptcy. The defendant is mistaken in his law. There is no place for the doctrine of *bona fide* purchase for value without notice in the transfer of such a chose in action. Not only does any purchaser of a chose in action of this character take it subject to all equities of the original parties to the chose in action, but a second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee. The doctrine is clearly enunciated in Pom. Eq. Jur., §§ 703, 704, 707-711, 918, and note. Independent of the foregoing, and without regard to the question as to alleged frauds and misrepresentations, I could not, upon the evidence, sustain the purchase from Gage at Denver in 1879. It appears from Sutherland's own testimony that Gage, when he made his assignment, did not schedule this claim; that when Sutherland arrived at Denver, and ascertained this fact, he, after some negotiations with Gage, got Gage's and the assignee's consent to file a petition for the sale of this claim, stating the fact that it was omitted because it was considered as of little or no value; that such a petition was filed and the necessary proceedings were taken therein, and Sutherland was declared to be the purchaser for the sum of \$10. Gage and the assignee swore that it was omitted from the first schedule because he told the assignee that it was a matter that did not belong to him; that he held it in trust; and they both swore that they told Sutherland the same thing, or rather that Mr. Gage told Sutherland the same thing. According to defendant's own evidence, in order to induce Gage to sell or consent to a sale of his interest, he insisted to Gage that, having purchased McMullen's 52½ per cent. interest, and having a contract with

him for one-half of claim for services as attorney, he (Sutherland) in fact owned the whole claim. He used this purchase from McMullens as a club to induce Gage to consent to a sale of his interest in the claim for the nominal sum of \$10, when it was his duty to advise Gage that the law made him a trustee of the McMullen assignment for the benefit of the owner of the claim, and also to advise Gage of the liability of the stockholders, and the real value of the claim. Concealment, under such circumstances, will vitiate a transaction as much as misrepresentation or actual fraud.

“The defendant sets up as a defense the statute of limitations and of laches in bringing this suit. It appears that in 1875 the complainant and defendant quarreled. They quarreled because Sutherland demanded of him an assignment of the one-half interest, according to his understanding of the original agreement, and defendant filed a bill against the complainant to establish a lien for his fees. Complainant, June, 1875, filed in the Circuit Court a written discharge of defendant from the case. This discharge came to defendant's notice within a day or two. He still continued to appear and act as petitioner's solicitor, and is the solicitor of record to this date. Defendant relies on the discharge filed as absolving him from the relation of solicitor to Reeve. He gives his reasons for continuing to appear of record, which were, first, that after he was discharged by the filing of the written discharge he desired to protect his own interest in the claim, and, having his bill pending for the establishment of his lien, he continued to act until that was dismissed, and that he did not act from that time up to the employment by Mr. Gage in 1876, and that from 1876 on until his purchase from Mr. Gage, in 1879, he acted for Gage, and after 1879 for himself, although it being a chose in action, Reeve being a defendant, he allowed the record to stand as the claim of Reeve, and contented himself with obtaining the order of August 7, 1879, that

the claim be prosecuted in Reeve's name for his own benefit.

"The defendant sets up as a defense the statute of limitations of five years, and the equitable defense of laches in bringing this suit. It is sufficient to say that this is an attack upon a decree or order of this court obtained without notice to the petitioner, and under circumstances which it is alleged amounted to a fraud. A judgment obtained by fraud is not only a fraud upon the party, but upon the court. The statute of limitations in cases of this nature is applied in equity only by analogy to the limitations at law, and a court of equity will not apply the law statute where it would be inequitable to do so. The proceeding or suit in which the order and decree, interlocutory in their nature, were obtained, is still pending, and the obtaining of the same without notice to Reeve was an imposition on the court. The defense of the statute of limitations has no standing in this case for that reason, as well as for the reason that Sutherland holds whatever title he obtained from Gage upon the same trusts that Gage held it.

"The equitable defense of laches is insisted upon. It is insisted that in August, 1879, Sutherland caused a notice to be served upon Reeve that he had become the exclusive owner by purchase, sale and assignment of the whole of his claim, which claim was in the year 1876 wholly sold, assigned and transferred and set over to David A. Gage; and that he (Sutherland) had obtained an order to prosecute the accounting then being carried on in court on said claim for his (Sutherland's) benefit. It might well be asked if, in 1876, as Sutherland alleges, he believed Gage to be the absolute owner of said claim, and if he had no notice that Gage held as trustee for Reeve at the time of the purchase of Gage or his assignee at Denver, in 1879, why did he deem it necessary to give any such notice to Reeve? The defendant, Reeve, denies the receipt of any such notice, or even knowledge of the matters contained therein, until May,

1888. There is some evidence that he had notice in 1882, of some kind, as to an assignment by Gage, but I will refer to that hereafter. The evidence is very conflicting as to the service of the notice in 1879, and I do not deem it necessary to decide whether such notice was served or not. The defense of laches by reason of lapse of time and inaction of the party seeking relief will not be permitted where the party was in ignorance of the material facts connected with the transaction which is attacked, or of his rights in relation thereto. If the notice was intended to be a basis for the commencement of the running of time upon which the doctrine of laches is based, he should have notified Reeve of the purchase of the McMullen and of the McDonald & Whitcomb claims, of the manner in which such purchases were wrongfully used to induce Gage to consent to the purchase by Sutherland made in Denver, of his interest in the Reeve claim, and to give his guaranty concerning the same in 1879 (the consideration for the Reeve claim being \$10) and that it was represented by Sutherland that the Gage interest was absolutely of no value. The notice should have also disclosed the fact that in Sutherland's judgment the claim was of great value, because of the liability of the stockholders of the Great Western Telegraph Company. The petitioner, Reeve, alleges as a reason for his delay and apparent neglect of the claim that he never knew until 1888 that there was any liability to the full amount of the stock on the part of the stockholders of the Great Western Telegraph Company, and that Sutherland never advised him to that effect, but studiously concealed from him that there was such a liability. Reeve alleges also, as excuse for his inaction and apparent abandonment of interest in the case, that he rested quiet because he believed Sutherland, under his retainer, to be paid out of the proceeds, would collect the claim; that he knew he was trying to do so; and that Sutherland led him to believe that the only money that could be realized would be from the tangible property, and

for some unpaid portion of the 30 per cent. for which the stock was sold; also that, hearing the tangible property was sold for \$15,000, he supposed the claim of but very little value after payment of costs and Sutherland's fees. The evidence sustained, in my opinion, this contention of Reeve's. I have looked over the evidence carefully, to see if Sutherland, when on the stand, swore that he did give either Reeve or Gage his opinion that this liability of stockholders for the full amount of their stock existed, and I find no evidence of his to that effect. Nor will the answer under oath avail the defendant in this regard. The answer, while being particular to deny, as to almost all matters, the allegations of the bill by repeating and denying the same word for word, does not, at least in this particular, meet the requirements of an answer under oath. This bill demanded a direct affirmance or denial as to whether he did give Reeve an opinion and information as to the liability of the stockholders. I do not mean a demand in words, but the spirit of the charge necessitated such an answer on that point, if it was to be used as a defense requiring the evidence of two witnesses, or of one with corroborative circumstances, to overcome it. The denial is that he never withheld from Reeve any facts touching the liability of the stockholders. He might have given all the facts to Reeve, and Reeve still be as ignorant as before as to such liability. Reeve's delay, inaction and failure to communicate with Sutherland, or to take any particular interest in the prosecution of the claim, may be accounted for if he thought the claim of little, and probably of no, value after the payment of solicitor's fees and costs, when it might not be reasonable conduct in one who knew or had been advised of the stockholders' liability, and that with proper effort the whole of the claim allowed in 1879 for over \$154,000 might be collected with interest. An abandonment of a claim of such a large amount to one who had paid almost nothing for it—an acquiescence that Sutherland should have and

retain a claim of such a magnitude—all the facts being known to him (Reeve), and knowing his rights in the premises, would hardly seem consistent with the sanity of the petitioner.

“The only remaining question in this case is as to defendant’s right to an undivided half of this claim by virtue of an assignment made in 1876 by David A. Gage, very soon after he received the assignment from Reeve. The consideration was the services theretofore rendered in the prosecution of this claim, and to be thereafter rendered. I find myself embarrassed by the pleadings in this case. The petition does not attack this assignment, although it was distinctly set up and relied upon in the answer as having been made under the authority conferred by the assignment to Gage. Under the pleadings in this case I am only authorized to inquire whether it was made by Gage, and did he have the authority to make it? I am not authorized to inquire whether it was obtained by undue influence, by fraud, or even whether the fee is an extortionate one, for the reason that no such attack is made on it by petition. If petitioner wished to attack it upon any of these grounds, he should have amended his petition. He did ask leave to do so on the hearing, but, it appearing that Gage was dead, such leave was refused. Agreements of this nature between attorneys and clients have been sustained by our Supreme Court when fairly made, and under proper conditions. Gage’s signature being to the assignment, the only question is, had Gage power to make the agreement to give one-half for Sutherland’s services rendered and to be rendered? The assignment to Gage is absolute on its face, and in express words gave Gage power ‘to litigate or adjust the claim as he saw fit.’ In the absence of any attack on Gage or Sutherland as to the fairness of the transaction, and as it is not forbidden by our law that such a contract be made between solicitor and client, I can only inquire as to the fact of making the same, and Gage’s right to make it. The

assignment to Gage gives a broad power and control to Gage over the claim and over the litigation of it, and I am of the opinion that it was sufficient authority to Gage to make the agreement with Sutherland. Reeve was in Chicago for about two years thereafter, and I am inclined to the opinion from the evidence that he knew Gage had made this assignment. There is evidence tending to show that about two weeks after it was made Sutherland met Reeve on the street, and some words passed, either as to Gage having assigned, or as to his being willing to assign, one-half interest to Sutherland. As Gage was then in Chicago, it would have been only natural that Reeve should then have inquired as to the matter. There is also an undisputed letter of Reeve's to Culver in 1882, which refers to the fact that Gage had made an assignment. This might be equally as applicable to the assignment of the one-half in 1876, as to that made in 1879. What Culver affirms that Reeve told him at that time is explicitly denied by Reeve. The defendant has spent considerable money and years of professional labor in prosecuting this claim, relying certainly for a number of years on the assignment of 1876. Upon the pleadings and also upon the evidence I sustain defendant's title to the undivided half under the agreement (or assignment) of 1876.

"I have disposed of this case without feeling called upon to decide whether, after June, 1875, Mr. Sutherland was Reeve's solicitor. I shall only say that Mr. Sutherland appeared continuously from that date, and even now appears, of record as solicitor for Reeve. He, however, contends, that from the date of Reeve filing his discharge in court—June, 1875—until October, 1876, when Gage made the assignment of one-half of the claim, he only appeared to protect his own interest, and after October, 1876, to his last purchase, in 1879, he appeared in the interest of Gage, and since then in his own interest. This contention may be true, and I am not prepared to say on the evidence, and

certainly not desirous to hold, that Mr. Sutherland intended, after June, 1857, to act for or on behalf of Selah Reeve as his solicitor, or supposed he was guilty of any unprofessional conduct towards him. The mistake he has made has been in endeavoring, while connected with the prosecution of the claim, to acquire the ownership of the subject-matter of litigation, and in supposing that he could occupy the position of a *bona fide* purchaser without notice of a chose in action of this character. There must be an accounting as to what moneys have been paid by Sutherland to the McMullens, to McDonald & Whitcomb, and to the assignee in bankruptcy of Gage for their respective interests or liens, and for the expenses and costs of the prosecution of the Reeve claim; also of the moneys received by Sutherland on behalf of said claim. The decree may provide for setting aside the order and so much of the decree as finds and decrees that Sutherland is the owner of the claim, and that it be prosecuted for his benefit; and that the court on the issue herein finds and decrees that Sutherland is entitled to the undivided half, and has an interest in said claim only to the extent and upon the terms and conditions of the assignment of Gage to him, May or October, 1876; that the petitioner, Selah Reeve, is entitled to remainder of said claim, and proceeds thereof; and that a reference be had to a master to take such accounting, and the question of costs and all other matters be reserved until the coming in of the master's report, and for further directions."

A decree was accordingly entered, and Sutherland appealed to the Appellate Court, where the decree was affirmed. That court, after setting out the foregoing opinion, filed the following:

"Upon a careful consideration of the arguments contained in the briefs of counsel, and a thorough and painstaking examination of the record, we have reached the conclusion that the issues made by the pleadings, the findings from the evidence, and the legal principles governing

the rights of the parties are correctly stated in the foregoing opinion. Assuming that appellant's contention that the case was improperly consolidated with what is known as the 'Terwilliger Case' is true, such order in no way injured appellant. The case proceeded to decree as an independent suit, and the order of consolidation had no effect whatever on the result. The case turns principally, and almost wholly, on the relation which appellant sustained to Reeve or the Reeve interest on the records of the court. We affirm the decree of the court below, not on the ground that appellant committed any actual fraud or intentional wrong in procuring an interest in the subject-matter of the legislation, which was adverse to Reeve. Appellant regarded his relations with Reeve as in fact severed, and that he owed him no further duty, and the facts were cogent to justify such a moral conclusion on his part. He was mistaken, however, as to the legal consequence of his never formally changing the relation by which he was connected with Reeve upon the record. He, in legal effect, declines to be discharged as Reeve's solicitor, but persisted in holding the place which he originally obtained in the suit by Reeve's employment, and with Reeve's consent. He continued from beginning to end to be Reeve's solicitor on the record, and the evidence shows, though appellant may not in fact have known it, that the interest he was procuring was Reeve's interest. Decree affirmed."

Messrs. Sawin & Vanderploeg, Thos. J. Sutherland, Wm. P. Black, and Adolph Moses, for appellant.

Mr. George R. Grant and Mr. Charles E. Pope, for appellee.

PER CURIAM.—The record in this case has been submitted to a careful consideration and analysis, and we have arrived at the conclusion that the decree must be affirmed. A re-discussion of the case would be productive of no good, and we have deemed it sufficient to place our decision upon the grounds stated in the opinions of the Chancellor and Appel-

late Court. For the reasons therein stated, the decree will be affirmed.

Affirmed.

The relation between client and attorney is confidential in the highest degree, and equity avoids as between them, at the suit of the client, transactions which as between other persons would be unobjectionable: *Story Eq. Juris.*, § 310; *Sidney v. Ranger*, 12 Sim. 118; *Salmon v. Cutts*, 4 DeG. & Sm. 125; *Pearson v. Benson*, 28 Beav. 598; *Denton v. Downer*, 23 Ib. 285; *Popham v. Exham*, 10 Ir. Ch. 440; *Macleod v. Jones*, L. R. 24 Ch. D. 289; *Smith v. Brotherline*, 62 Pa. 461.

An attorney is not under an absolute incapacity to purchase from his client: *Edwards v. Meyrich*, 2 Hare, 60; *Tragman v. Littlefield*, 45 N. Y. S. R. 673; but the burden of showing that the transaction was perfectly fair and equitable rests upon the attorney; if he fail to establish this by proof, the case becomes in equity one of constructive fraud, which will be relieved against. The presumption is that the sale or transaction is void, or rather voidable at the option of the client; the attorney is permitted if he desire to uphold the transaction, to show its entire fairness, and that no advantage was in any way taken of the client, the burden rests upon him to do so, and every presumption is against him: *Pisani v. Atty. Gen.*, L. R. 5 P. C. 516; *Morrison v. Smith*, 130 Ill. 304; *Laclede Bank v. Keeler*, 109 Ib. 380; *Tarrell v. Reynolds*, 35 Minn. 476; *Falker v. O'Brien*, 2 Ball & B. 319; *Gresley v. Mauseley*, 4 DeG. & J. 78. The requirement in this respect is discharged (when the client acted without independent advice) only when it appears that the advice and information given by the attorney were the same as would have been given by him had he been acting as legal adviser only. This is in effect the rule laid down by Lord ELDON in *Gibson v. Jeyes*, 6 Ves. 271; and is upheld by *Montesquieu v. Sandys*, 18 Ves. 313; *Bellew v. Russell*, 1 Ball & B. 104; *Harris v. Tremeneere*, 15 Ves. 34; *Cane v. Allen*, 2 Dow, 289; *Waters v. Thorn*, 22 Beav. 547; *Spencer v. Topham*, Ib. 573; *Dunn v. Dunn*, 42 N. J. Eq. 481; *Petrie v. Williams*, 68 Hun, 589; this rule is not altered by the fact that the client

is a business man : *Barnard v. Hunter*, 2 Jur. N. S. 1213, and the mere *formal* interposition of another attorney will not relieve the first attorney from his responsibility to his client if the second attorney do not take entire charge of the matter, or when he, with the knowledge of the first attorney, does not do his duty : *Gibbs v. Daniel*, 4 Giff. 1 ; *King v. Savery*, 1 S. M. & G. 271, 8 H. of L. 627 ; *Barnard v. Hunter*, *supra* ; *Low v. Holmes*, 8 Ir. Ch. 53. In proving fairness other evidence of proper consideration than that derived from the recitals in the instruments must be given : *Gresley v. Mauseley*, *supra* ; *Lawless v. Mansfield*, 2 Dr. & W. 557 ; *Brock v. Barnes*, 40 Barb. 521. The rule above stated applies with particular force to purchases by the attorney from his client of the subject-matter of litigation, and it is held that such a purchase is voidable at the option of the client, if exercised within a reasonable time, except when the purchase has been deliberately ratified or confirmed with full knowledge of the fact, or the rights of other persons have intervened : *Lewis v. Brown*, 36 W. Va. 1.

The confidential relation prohibits the purchase by an attorney who conducts a sale, under process, of property in which his client is interested : *Re Blaye's Trust*, 1 McN. & G. 488 ; *Popham v. Exham*, 10 Ir. Ch. 440 ; *Atkins v. Delmage*, 12 Ir. Eq. 1. It has been held that the attorney may buy in at a sale, for the purpose of protecting his own rights, but, as against his client, his purchase is good only to the extent necessary for that purpose, any value beyond that his client may claim : *Edwards v. Gottschalk*, 25 Mo. App. 549, for the attorney, or counsel, cannot speculate upon his client's misfortune, or be allowed to use his knowledge, acquired as adviser, for his own profit, hence he is not permitted to buy in, for his own benefit, any outstanding title, or acquire any lien upon his client's property, or purchase any claim against his client without the latter's full knowledge and consent : *Carter v. Palmar*, 8 C. & F. 657 ; *Hobday v. Peters*, 28 Beav. 354 ; *Davis v. Kline*, 96 Mo. 401 ; *Downard v. Hadley*, 116 Ind. 131 ; *Cunningham v. Jones*, 37 Kan. 477 ; *Henry v. Raiman*, 25 Pa. 354 ; *Smith v. Brotherline*, 62 Ib. 461 ; *Harper v. Perry*, 28 Wis. 57 ; *Case v. Carroll*, 35 N. Y. 385 ; *Davis v. Smith*, 43 Vt. 269 ; *Wheeler v. Willard*, 44 Ib. 641 ; *Baker v.*

Humphrey, 101 U. S. 494; *Barrett v. Bamber*, 9 Phila. 202; *Bank of London v. Tyrrell*, 27 Beav. 273; *Hughes v. Willson*, 128 Ind. 401; *Succession of Hoss*, 42 La. Ann. 1022; *Lacey v. Baker*, 85 Ga. 687.

The relation, which calls into operation the rule above stated, begins so soon as the attorney has been consulted and has allowed facts to be communicated to him, with reference to the subject of contract or purchase, which, but for the consultation, he would not have learned: *Lacey v. Baker*, *supra*. It does not depend upon the receipt of a retainer: *Hobday v. Peters*, *supra*. The relation once begun, the attorney cannot put himself at arm's length, so far as concerns his client, by abruptly terminating his employment so long as anything remains to be done with reference thereto: *Macleod v. Jones*, 24 Ch. D. 289; *Gooch v. Peebles*, 105 N. Car. 411; *Edwards v. Gottschalk*, *supra*; even after the relation has terminated, although free to make contracts with his late client in regard to other matters, as any other person would do: *Story Eq. Jur.*, § 3, 13; the attorney cannot deal with his late client with reference to the property, about which he has been employed, without communicating his knowledge acquired during the employment: *Holman v. Laynes*, 4 De G., M. & G. 270; *Downard v. Hadley*, 116 Ind. 131; *a fortiori*, he may not, without such communication, purchase at a sale made in consequence of advice given by him during the employment: *Trotter v. Smith*, 59 Ill. 240; and see *Galbraith v. Elder*, 8 Watts, 81; *Henry v. Raiman*, *supra*. If the attorney purchase land which he has been employed to recover, he must show that the action to recover the same had been abandoned and that the relation between himself and the plaintiff had ceased before the purchase: *Sullivan v. Walker* (Miss.), 12 So. 250.

The confidential character of the relation of attorney and client and the presumed influence of the former over the latter is emphasized by the case of *Herrick v. Lynch*, 150 Ill. 283, in which it was held that the rule of equity denying relief when sought by one party to a fraudulent deed against the other would not be applied, when an attorney had induced his client to enter into a scheme to defraud his creditors and loaned him the money needed to carry out the scheme, to secure which he gave the attorney the deed which it was sought to set aside.

It is to be noted, however, that the mere fact that one of the parties to a contract is a lawyer does not call for the interposition of equity to protect the other party: *Edwards v. Williams*, 11 Week. Rep. 561; *Taton v. White*, 95 N. Car. 453.

Boundaries—Street—Religious society—Adverse possession—Legislative powers.

GUMP *v.* SIBLEY.

(Court of Appeals of Maryland, March 14, 1894.)

A conveyance, which is described as bounding upon a street or other public highway, conveys to the grantee, subject to the right of way in the public land to the centre of the street, provided that the grantor has title to the soil of said street.

Although in Maryland a deed of land to the trustees of a Roman Catholic church for a cemetery be void for failure to show on its face its purpose, adverse possession for twenty years under such deed perfects the title as against all persons not under legal disabilities.

Objections to a conveyance to trustees of a Roman Catholic church for the purposes of a cemetery, which required the assent of the legislature because it failed to show its purpose, are removed by the Act of 1832, c. 308, which provides that the trustees of any such church, holding title to any land used as a graveyard, may convey the same to the Archbishop of Baltimore, to be used only as a church lot, parsonage or graveyard.

The legislature, after authorizing a religious body to hold land for a specified purpose, may remove the restrictions upon the use of the land.

Appeal from the Circuit Court of Baltimore city.

A bill was filed by Ansil H. Sibley against Moses B. Gump praying a decree for the specific performance of a contract by which the defendant agreed to purchase land from the complainant. The facts sufficiently appear in the opinion *infra*. There was a *pro forma* decree that the defendant accept the land and pay for it. The defendant took this appeal, which was argued before ROBINSON, C. J., and

BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE and BOYD, JJ.

Harry C. Gaither and John H. Grill, for appellant.

Geo. R. Willis, for appellee.

BRYAN, J.—Ansil H. Sibley contracted to sell to Moses B. Gump certain real estate in the city of Baltimore. He filed a bill in equity for the specific performance of the contract, and by consent the court passed a *pro forma* decree commanding Gump to accept the property and to pay for it. An appeal has been taken for the purpose of obtaining the opinion of this court on the validity of the title to the property.

George Weller was possessed of a leasehold estate in twenty-three acres of land in the city of Baltimore, renewable forever. He subleased, in 1808, four acres of this tract to John Hildt, and covenanted that this sublease should be renewable forever. In this sublease each party covenanted that he would keep open on the north side of the four-acre lot, and adjoining it, one perch of his ground, running from Rose street to Price street (now Madison avenue), so as to make a street thirty-three feet wide, for the mutual benefit of themselves, their heirs and assigns. In 1809 he subleased another portion of the said twenty-three acres to Frederick Jourdan, renewable forever. This lot is described as beginning two perches north forty-three degrees west from a corner of John Hildt's lot, and bounding on an alley called "School-house alley," which is the street thirty-three feet wide mentioned in the lease to John Hildt. This was originally a private alley, and it does not appear ever to have been dedicated to the public; at all events, it has been closed, and its site is now occupied by dwelling-houses. The controversy is about the title to the north-western half of it; that is to say, the portion not embraced in the lease to Hildt. George Weller, by his last will and testament, devised to Jourdan all his estate in the lot which

he had leased to him, and the reversionary title in the twenty-three acre tract is now vested in Sibley, the complainant below. As we have said, the lease to Jourdan describes the lot as bounding on School-house lane. In *Peabody Heights Co. v. Sadler*, 63 Md. 533, the effect of such a description was considered. All the judges who heard the case adopted the views of Chancellor KENT on the subject. He says: "The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it after parting with all his right and title to the adjoining land is never to be presumed. It would be contrary to universal practice, and it was said in *Peck v. Smith*, 1 Conn. 103, that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as a general rule that a grant of land bounded on a highway or river carries the fee in the highway or river to the centre of it, provided that the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent." A majority of the court held that the rule did not apply in that particular case, because stones were placed by the parties at the side of the road as bounders, and the deed called for these bounders, and the lines ended at them. They therefore decided that the road-bed was excluded by literal and exact description. The same ruling was made in *Hunt v. Brown*, 75 Md. 481, 23 Atl. 1029. In this last case, after stating the general rule, it was said: "And, whatever may be the rule elsewhere, it is well settled in this state that a grant of land by metes and bounds and courses and distances, with calls for visible boundaries on the side of a highway—for instance, a call for a stone planted on the south side of a

road, and running thence, by the south side of the road to another stone—these calls and boundaries will be construed as defining the limits of the property thereby conveyed; and the grantee, under such a grant, will not take the fee to the middle of the road. Such was the description of the property in the Peabody Heights Co. case." In the present case there is nothing to prevent the operation of the general rule, and therefore Jourdan's title extended to the middle of School-house lane, subject, of course, to the easement of the right of way over it.

In 1833, Jourdan, for valuable consideration, conveyed a portion of his lot in fee simple to the trustees of St. John's German Catholic Church of Baltimore, describing its boundaries according to a plat annexed to the deed of conveyance, and made a part of it. According to this plat the first line of the lot bounds on School-house alley, and there are no calls in the deed for fixed objects, natural or artificial, to mark the ends of the lines. Under the rule which we have just cited, the title conveyed reaches to the middle of the alley, subject to the right of way. The lot contained less than two acres, and was purchased to be used, and was used, as a burial ground. It is contended that the deed is void under the 34th section of the declaration of rights of 1776, and that no title vested in the grantee, because it was not stated upon the face of the conveyance, that it was to be used as a burial ground. The lot was purchased for a lawful purpose, and was used for a lawful purpose. If the decision in *Grove v. Trustees*, 33 Md. 451, is to be construed as establishing the right of a grantor, who had received full and valuable consideration, to vacate his deed, because it did not express on its face the lawful purpose for which the property was bought, this right vested in Jourdan as soon as he had delivered the deed. Consequently the statute of limitations commenced running against him on that very day, and has been running for more than sixty years. The deed, even if void, could not be less than color

of title, and the entry under it would constitute adverse possession to the extent of the boundaries contained in it; and a continuance of this possession for twenty years would perfect the title against all persons not under legal disabilities: *Hoye v. Swan*, 5 Md. 237; *Carter v. Woolfork*, 71 Md. 283, 17 Atl. 1041; *Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646. As the statute began to run against Jourdan in his lifetime, it is not suspended by his death nor by the supervention of infancy, coverture or other disability; but it has become a bar against all persons claiming under him. In 1840 the trustees of St. John's Church conveyed this lot to "the Most Reverend Samuel Eccleston, Archbishop of Baltimore, and his successors in the Archiepiscopal See of Baltimore, according to the discipline and government of the Roman Catholic Church, forever, according to the provisions, and for the uses, intent and purposes set forth in the Act of 1832" (chapter 308). We have quoted the language of the conveyance. It is unnecessary to say anything more about this deed than that it is in conformity with the Act of Assembly. It appears that a decree was passed by the Circuit Court of Baltimore city for the sale of this lot under proceedings in said court by virtue of the Act of 1868, for the sale of burial grounds. The record of these proceedings is not set out in the transcript sent to this court; but we understand the agreement of counsel to mean that they were regularly conducted in compliance with the statute. A deed was made in 1873 to the purchaser by the trustee appointed to make the sale. The deed conveyed the burial ground, bounding one of its lines on School-house lane, and in the granting part it used these words: "Together with all interest, the bed of School-house lane, and to any and all ground formerly used as part of said burial ground, to which the parties owning said burial ground may have acquired title by possession or otherwise." The Act of 1832 provided that the trustees of any Roman Catholic church who held the title to any lot on which a

Roman Catholic church was erected, or which was used as a graveyard, attached to any such church, might convey the same to the Archbishop of Baltimore and his successors, according to the discipline and government of the Roman Catholic Church, forever. It also provided that the lot should not exceed two acres, and that it should be used only as a church lot, parsonage and burial ground, meaning, of course, that it should be used for one of these purposes, and not intending to require that the same lot should be used for all of them. There was another provision, that if not used for these purposes—that is for one or other of them—the conveyance should be void. By this Act the Archbishop of Baltimore was empowered to hold property in a corporate capacity. It was an enabling Act. One incidental effect of it may be noticed in passing. If the deed from Jourdan to St. John's Church be supposed to require the assent of the legislature because it was not stated therein that it was intended to be used as a burial ground, all objection for that reason is removed by this Act. It, in the clearest possible manner, gives the assent of the legislature, inasmuch as it enables St. John's Church to make a valid conveyance of the title. It would be a waste of words to show that this was a full recognition and confirmation of the title already existing. It is true that this deed is not specially mentioned in the Act of 1832; but that Act, in its terms, comprehends all lots used as graveyards under the circumstances therein mentioned. And it is settled by *Trustees v. Manning*, 72 Md. 116, 19 Atl. 599, that a deed may be sanctioned and confirmed by an Act of Assembly without making special reference to it. The sale of the lot under the Act of 1868 (chapter 211), relating to burial grounds, put an end to the use for which the Archbishop was authorized to hold the lot by the terms of the Act of 1832. But when the legislature authorized the sale of these burial grounds, and a devolution of the title to the purchasers, it would be an absurdity in the interpretation of

the language to hold that it intended to defeat the title of the persons or corporations whose property they had authorized to be sold. The reasonable, just and necessary construction of the Act of 1868 is that in this particular it enlarged the corporate powers granted to the Archbishop by the Act of 1832. It removed the restriction which required that this lot should be used only as a burial ground, and enabled him to cause the title to be conveyed to a purchaser. It was certainly competent for the legislature to do this. All legislative powers belongs to the legislature, except where limited by the Constitution of the United States, or by the declaration of rights, or by the Constitution of the state. We refer not now to certain proceedings in the form of statutes which have been so unjust and oppressive, and so repugnant to the spirit of enlightened government, that some good men and able lawyers have declared that they were not in the nature of the legislative acts. Such exceptional transactions do not pertain to our present purpose. We are considering the ordinary course of lawmaking power within its well-recognized limits. There was nothing in the Constitution to prevent the legislature from granting corporate capacity to the Archbishop, and there is nothing to prevent it from enlarging and extending that capacity. It had the undoubted right to limit the purposes for which lots of ground conveyed under the Act of 1832 should be held, and it had the undoubted right to remove that limitation. A further reference to this question is not necessary, as it has been ably and lucidly discussed by Judge McSHERRY in *Trustees v. Manning*. Our opinion is that, under the equity proceedings authorized by the Act of 1868, the purchaser took a good title to the burial lot, including the north-western half of School-house lane. We understand from the agreement of counsel that Sibley had acquired this title, and that the objection which Gump makes to the completion of his purchase applies only to a strip of land a foot and six inches wide, lying in the northwesternmost portion of the

alley, and adjoining its boundary. We must affirm the decree below.

Decree affirmed, with costs.

Where in a conveyance a street or highway is called for as a boundary, the grant will ordinarily extend to the centre of the road, subject to the public right of travel : *Stiles v. Curtis*, 4 Day, 329 ; *Peck v. Smith*, 1 Conn. 103 ; *Perkins v. Benson*, 28 Mich. 538 ; *Chatham v. Brainerd*, 11 Conn. 60 ; *Alden v. Murdock*, 13 Mass. 256 ; *Trustees of Hawesville v. Lander*, 8 Bush, 79 ; *Watkins v. Lynch*, 71 Cal. 21 ; *Dodge v. Penna. R. R. Co.*, 43 N. J. Eq. 351 ; *Cottle v. Young*, 59 Me. 105 ; *Greer v. N. Y. C. & H. R. R. Co.*, 107 N. Y. 681 ; *Columbus & Western R. R. Co. v. Withrow*, 82 Ala. 190 ; *McQuaid v. P. & V. R. Co.*, 18 Oreg. 237 ; *Florida So. R. Co. v. Brown*, 23 Fla. 104 ; *Warbritton v. Demorett*, 129 Ind. 346 ; *Silvey v. McCool*, 86 Ga. 333 ; *Andrews v. Youmans*, 78 Wis. 56 ; *Firmstone v. Spaeter*, 150 Pa. 616 ; *Edmison v. Lowry* (So. Dak.), 52 N. W. 583 ; *Re Frick's Estate*, 6 Kulp, 329 ; *O'Connor v. Nova Scotia Teleph. Co.*, 22 Can. S. C. 276 ; *Jacksonville T. & K. W. R. Co. v. Lockwood*, 33 Fla. 573. This rule applies, although in the deed there be no dedication of the land, covered by the right of way, to public use : *Gear v. Barnum*, 37 Conn. 229 ; or if the street or highway be never dedicated or brought into public use : *Jacob v. Woolfolk*, 90 Ky. 426 ; *Dobson v. Hohenadel*, 30 W. N. C. 54, 148 Pa. 367 ; and where the right of way over the street is that of a railroad : *Ayres v. Pa. R. R. Co.*, 52 N. J. Law, 404 ; *Evans v. S. & W. R. R. Co.*, 90 Ala. 54 ; it applies where the boundary is a private way : *Motley v. Sargent*, 119 Mass. 231 ; or an alley : *Transue v. Sell*, 105 Pa. 604 ; *Lindsay v. Jones*, 21 Nev. 72 ; *St. Charles First Presbyterian Church v. Kellar*, 39 Mo. App. 441 ; to cases in which lots have been sold by a recorded plat : *Cox v. L., New A. & Ch. R. R. Co.*, 48 Ind. 178 ; or map : *Re Ladue*, 118 N. Y. 213 ; and the effect will not be destroyed by a covenant to lay out a street within a given time : *Ib.* ; to cases in which the lot has been sold by number or other description : *Kneeland v. Van Valkenburgh*, 46 Wis. 434 ; and even where its application reduces the amount of land of which the grantee has the absolute enjoyment ; thus where the grant was of ninety feet to a passage-

way, it was held that the ninety feet must include one-half of the passage-way: *Walker v. Boynton*, 120 Mass. 349; the rule applies although the road called for as a boundary is bounded on the other side by a navigable river: *Lotz v. Reading Iron Co.*, 10 Pa. C. C. R. 497; and when lots lying between a stream and a highway are partly covered by a mill-race and a roadway: *Smith v. Ch., M. & St. P. R. Co. (Wis.)*, 50 N. W. 497.

The above rule is subject to limitations, and its operation may be ousted by proper words which limit the amount of land granted. The mere recital of the amount granted will not of itself exclude the right of the grantee to the fee to the middle of the road called for as a boundary: *Frazer v. Ott*, 93 Cal. 661; but a conveyance of town lots from the southeast corner, north to a northeast corner, thence west a certain number of feet, gives the number of feet called for, exclusive of the bed of the road, although the town plat is accompanied by a certificate that the lots fronting upon the street extend to the centre thereof: *Montgomery v. Hines*, 134 Ind. 221, a description of land as running along a certain exterior line of a street or as bounded by such a line is held to make that line, and not the centre line of the street, the boundary: *Severy v. Central Pass. R. R. Co.*, 51 Cal. 194; *Lough v. Machlin*, 40 Ohio St. 332; *G. R. & I. R. R. v. Heisel*, 38 Mich. 62; *Smith v. Slocomb*, 9 Gray, 36; *Sibley v. Holden*, 10 Pick. 249; *Hughes v. Providence, etc., R. R. Co.*, 2 R. I. 508; *Hoboken Land Co. v. Kerrigan*, 31 N. J. Law, 13; *B. & O. R. R. Co. v. Gould*, 67 Md. 60; and bounding "by the line of the road," without specifying what line, has been given the same effect: *Cottle v. Young*, 59 Me. 105; and so a grant of land to the line of a highway and "then in line with said street:" *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; and so a grant of land beginning at a point in a block on the line of a street and thence along the street: *Dexter v. Riverside & O. Mills*, 39 N. Y. S. R. 933.

But on the other hand it has been held that a mere grant to the line of a highway will not exclude the ordinary presumption that the road to its middle line is included: *Lehigh Street; Borough of Easton's Appeal*, 81½ Pa. 85. In *Peck v. Denniston*, 121 Mass. 17, a grant "beginning at the line of the high-

way at the northeast corner of the land of H. W., to the new avenue, thence running westerly on said avenue," was held to extend to the centre line; in *Orton v. Groves*, 68 Me. 371, a grant "to" and "thence by" a road, was held to make the centre of the road the boundary, although the measurement and distances would have carried the grant only to the side.

The true rule, in view of the above conflict, would seem to be that in case of a grant to the line of a street, unless there is something in the circumstances of the case, or apparent from the deed itself, to render it probable that the grantor had in his mind an intent to alter the effect ordinarily given by the law to a grant with a street as a boundary, the ordinary presumption should prevail and the centre line held to be the boundary. See 4 Shars. & Budd, Lead. Cases on Real Prop. 379.

A grant *along* a street will carry land to the centre: *Moody v. Palmer*, 50 Cal. 31; *Greer v. N. Y. C. & H. R. R. Co.*, *supra*; *Henderson v. Halterman*, 146 Ill. 555; so a grant *along the line* of a street: *Salter v. Jonas*, 39 N. Y. 469. A description beginning at a point on a certain line of a road and running by metes and bounds back to the same point, excludes the centre as the boundary: *Helm v. Webster*, 85 Ill. 116; *Gebhardt v. Reeves*, 75 Ib. 307; *Chicago v. Rumsey*, 87 Ib. 348. It has been held that the grant of a lot bounded "on" or "by" the *side* of a road, will exclude the road itself: *Jackson, ex d., Yates v. Hathaway*, 15 Johns. 447; *Holloway v. Delano*, 64 Hun, 34; *Morison v. N. Y. Elevated R. R. Co.*, 74 Hun, 398; but opposed to this are *Paul v. Carver*, 26 Pa. 223; *Johnson v. Anderson*, 18 Me. 76. In *Hobson v. Philadelphia*, 150 Pa. 595, it was held that a boundary by the side of a road, where the use of a street was specifically given, would not include any part of the road itself. The mere mention of a monument which is in the side of the road will not, *per se*, prevent the centre of the road from being the boundary of the land conveyed: *Low v. Tibbetts*, 72 Me. 92; *Dean v. Lowell*, 135 Mass. 55; but where the monument or point of beginning is described as in the side of the road and the description is continued by metes and bounds back to the place of beginning, which metes and bounds do not include the road-bed, the centre will not be regarded as the boundary of the grant: *Peabody Height Co. v. Sadtler*, 63 Md. 533; *Kings*.

County Life Ins. Co. *v.* Stevens, 87 N. Y. 287; English *v.* Brennan, 60 Ib. 609; Morison *v.* Elevated R. R., *supra*; Larkin *v.* Terwilliger, 29 Pac. 268; Hunt *v.* Brown, 75 Md. 481; but see Cochran *v.* Smith, 73 Hun, 597; Holloway *v.* Southmayd, 45 N. Y. S. R. 895. The fact that land is described as extending a certain distance to a highway, and that the said distance is precisely the same as the distance of the side of the road from the last-mentioned monument, will not make the side the boundary: Newhall *v.* Ireson, 8 Cush. 598, in which SHAW, C. J., said: "Land may no doubt be bounded by the side of a highway, but it must be done in clear and distinct terms to control the ordinary presumption." This case weakens very much the force of Tyler *v.* Hammond, 11 Pick. 193. In Church *v.* Stiles, 59 Vt. 642, the court admitted that as a general rule a conveyance to a road would include half the road, but held that the rule did not apply unless the fee of the road-bed were owned by the grantor. This same idea seems to be manifested by Hoag *v.* Pierce, 63 Hun, 794, where it was held that the ordinary rule might be controlled by the fact that the earlier deeds in the line of the title bounded by the *side* of the road, and the presumption that the property of the soil was in the village. The description of the subject of the grant as being in a certain direction from a road or street upon which it is bounded, does not necessarily exclude the road-bed from the grant: Helmer *v.* Castle, 109 Ill. 664. In such a case, it is said, the quantity of land conveyed may assist in the determination of the question whether the bed is included or not: Ib. and see Williams *v.* Sparks, 24 Ohio St. 141.

When land is described as beginning at the intersection of the exterior lines of two streets, the soil of the streets is necessarily excluded: White's Bank *v.* Nichols, 64 N. Y. 68, but a description merely beginning at the "junction" of two roads or at the side of a road "at the corner of a lane," will not necessarily have that effect: Cochran *v.* Smith, Holloway *v.* Southmayd, *supra*. Where an easement has been expressly granted over land, which would pass as part of the grant, were the centre rule to prevail, an intent to limit the grant may be discovered: Mott *v.* Mott, 68 N. Y. 246; Hobson *v.* Philadelphia, *supra*.

The rule that the centre is to be taken as the boundary may

be controlled not only so as to exclude the half of the road-bed, but so as to include the whole of it, as where one owning the land lays out a street entirely on one side of it, so that the boundary of his land and the boundary of the street on the same side are identical: *Haley v. Babbitt*, 16 R. I. 533; *Haberman v. Baker*, 128 N. Y. 253; *Snoddy v. Bolen* (Mo.), 24 L. R. A. 507; or if the grantor otherwise show his intent to be that the whole soil of the way shall pass. See *Albert v. Thomas*, 73 Md. 181.

Where a street or road is referred to as a boundary, its line as laid out and opened or built upon, and not the layout of record, is to be taken. See *De Verney v. Gallagher*, 20 N. J. Eq. 33; *Den, Haring v. Van Houten*, 2 Zab. 61; *State v. Smith*, 3 Ib. 130; *Aldrich v. Billings*, 14 R. I. 233; *Bradstreet v. Dunham*, 65 Iowa, 248; *Tebbetts v. Estes*, 62 Me. 566; *Falls River Water Power Co. v. Tibbetts*, 31 Conn. 165; *Burrows v. Webster*, 50 N. Y. S. R. 353; *Draper v. Monroe* (R. I.), 28 Atl. 340; *Winter v. Payne*, 33 Fla. 470. In *Stack v. Coffin*, 105 Mass. 328, it is held that where lands are conveyed as bounded on a passage-way, not yet in existence, the limit will be the centre of the assumed way, but in *Brown v. Heard*, 85 Me. 294, it is held that the actual location of the street is to be considered, although it be not located until after the deed is executed, since upon its establishment and recognition and use by the public it presumably becomes the street named in the deed. In *Andrew v. Watkins*, 26 Fla. 390, it is held that where a street is referred to "according to map," it is to be taken as it is laid out or actually surveyed.

The general rule above set out does not obtain in the case of deeds or town lots made by a county judge under the United States Revised Statutes, § 2387, who has entered a town site, in trust for the inhabitants thereof, which site has been platted and surveyed under the laws of Montana, 1867, p. 601, §§ 3-5, as the streets have been dedicated to public use before the conveyance of any of the lots in the plat: *Hershfield v. Rocky Mountain Bell Telephone Co.*, 29 Pac. 883.

Trade name—Sutor in equity required to have clean hands.

MILLBRAE COMPANY v. TAYLOR ET AL.

(Supreme Court of California, June 27, 1894. Commissioner's decision. Department I.)

A plaintiff in equity cannot be granted relief upon a claim to the exclusive use of a trade-mark, which contains a false representation, calculated to deceive the public as to the source of the article sold under the trade name.

Mills, the owner of land known as "Millbrae Station," and the plaintiffs formed a partnership, to keep cows on said land and sell the milk therefrom, under the trade name of "Millbrae Dairy." The partnership was subsequently dissolved and an agreement made whereby the plaintiffs took the milk routes and Mills agreed to supply the plaintiffs with milk from the land, which milk the plaintiffs sold, conducting their business under the name of "Millbrae Dairy." A few years later, the plaintiffs terminated the agreement, procured milk from other places, organized a company under the title of the "Millbrae Company." Mills then commenced the business of selling his own milk, and used on his wagons and bills the name "Millbrae Dairy" and competed with the plaintiffs, who filed a bill against Mills and agents to enjoin them from the use of the name "Millbrae." *Held*, an injunction should not be granted, as the plaintiffs' own use of the name "Millbrae" was a fraud on the public.

Appeal from the Superior Court, city and county of San Francisco.

In the court below the Millbrae Company brought an action against H. H. Taylor, D. C. Mills, and others to enjoin them from the use of the word "Millbrae" in carrying on their business, which name the plaintiff alleged to be a trade name belonging to the plaintiff, and to recover damages resulting from the defendants' illegal use of the same.

The facts appear in the opinion of the court *infra*.

Judgment was given for the defendants. The plaintiff took this appeal.

Wheaton, Kalloch & Kierce, for appellant.

Maxwell & McEnerney, for respondents.

HAYNES, C.—Action to enjoin the defendants from using a “trade name,” which it is alleged belongs to the plaintiff (a corporation), and for damages. Findings and judgment were against the plaintiff, and this appeal is taken from the judgment and an order denying its motion for a new trial. An outline of the facts, condensed from the findings, may be thus stated: Some time prior to 1865, the defendant, D. O. Mills, became and still is the owner of a tract of land in San Mateo county, at the railroad station now, and ever since 1865, known as Millbrae Station. From 1865 until August, 1883, A. F. Green and defendant Mills were copartners, engaged in the business of raising and keeping cows of superior quality and breed upon said land, and selling the milk therefrom in the city of San Francisco, said business being conducted, at least since 1875, under the trade name of “Millbrae Dairy;” the word “Millbrae” being compounded of the name of the owner of the ranch (omitting the “s”) and the Scotch word “brae.” In August, 1883, F. H. Green purchased a one-third interest in the cows and other personal property and business, and the firm as thus constituted continued the business until September 1, 1886, under the same trade name. At the date last named, the copartnership was dissolved by mutual consent and, in the settlement, A. F. and F. H. Green took the milk routes and business of selling the milk in San Francisco, with the wagons, horses and appurtenances, and defendant Mills, who was at all times the sole owner of the land, took all the dairy implements, supplies, cows and other personal property at the ranch, and on the same day entered into an agreement with said A. F. and F. H. Green, whereby he agreed to sell to them and they agreed to buy, not less than two hundred and seventy nor more than three hundred and ninety gallons of milk per day, at a price therein specified, the milk to be thus furnished by defendant Mills to be exclusively from his own dairy, and this agreement was to continue for at least one year. A similar agreement was

made each year, the last being dated September 1, 1889, the quantity named therein being not less than three hundred and sixty and not exceeding four hundred and ten gallons per day. This contract stipulated that it should be in force for at least one year, and thereafter until one of the parties should give the other three months' notice of his intention to terminate it. About July 1, 1890, A. F. and F. H. Green organized a corporation under the name of the Millbrae Company (the plaintiff herein), and conveyed to it their said business, property and good-will, they being the principal stockholders therein, and practically owning and carrying on said business through said corporation, and, on the 1st of August, 1890, ceased to take milk from defendant Mills under said contract, and thereafter the plaintiff procured from Marin county the milk with which it supplied its customers. Until the formation of the corporation, the business continued to be conducted by A. F. and F. H. Green under the name of the "Millbrae Dairy," and their delivery wagons were so marked, and that name was printed upon their bills and receipts, upon which it was also stated that the milk was "produced on Millbrae farm, San Mateo county." After the organization of the corporation, the name on the wagons and bills was changed to "Millbrae Company," and on the bills it was stated simply "pure country milk, produced from rich pasture, wholesome feed, healthy cows;" without any indication as to the locality except the word "country." On September 1, 1890, the defendant, D. O. Mills, commenced the business of selling milk, from his said dairy, in the city of San Francisco, and engaged defendant Taylor as agent for that purpose, and employed defendant Cole to manage the sale and distribution of the milk in the city; and in this business adopted and used upon his wagons and upon his bills the original trade name, "Millbrae Dairy," but specified upon his bills and advertisements that the milk sold was from the Millbrae dairy, in San Mateo county, and added: "Do not con-

found it with the Millbrae Company." At the time of the dissolution of the copartnership, a valuation was put upon all the property, and, among other items of the city branch of the business, which was taken by A. F. and F. H. Green, was "one hundred cans' trade, \$4,000."

The foregoing facts are not disputed, and are sufficient to present the principal question in the case. There are several specifications of the insufficiency of the evidence to justify certain findings, but these can be more briefly disposed of after deciding the principal question, since if the findings excepted to were framed as appellants suggested they would not change the result. It is insisted by appellant that the "trade name" is a part of the good-will sold by defendant Mills to Green & Green, and for which they paid a large sum of money; that such name is an important element in such good-will, and that plaintiff has the exclusive right to its use. Appellant is in error as to the facts to which he applies the law, and hence is wrong as to his conclusions. The findings upon this subject are not only supported, but are made clear by the testimony of F. H. Green, who was one of the parties to the contract under which it is claimed the good-will of the business and the right to use the trade name was sold by defendant Mills. He said: "Prior to that time (referring to his purchase of an interest in 1883) the business had been carried on by D. O. Mills and my father, under the name of the 'Millbrae Dairy.' I think they gave it the name of the Millbrae dairy in 1875 or 1876. In 1883, the business was in the name of the Millbrae dairy. I continued in business with them some three years. In 1886 we entered into an agreement to divide the business up. Mr. Mills took the interest in the country, and my father and myself took the interest here. Since that time my father and myself conducted the business under the name of the Millbrae dairy." It will also be observed that on the day of the dissolution of the partnership the contract was entered into for the sale by Mills to the Greens

of the milk produced at Millbrae, by which the Greens agreed to sell the same in San Francisco, and that defendant Mills has ever since continued the business of keeping cows and producing milk at the same place and under the same name. There was nothing said in the contract about the sale or transfer of the good-will, or of the use of the name under which the business had been conducted. It was not a sale of the entire business with which the name was connected, but a "division" of the business, and the name was equally applicable and equally important to each part. So long as the Greens or their successors continued to sell Millbrae milk, there was no conflict of interest in the use of the name, nor was there any agreement, covenant or obligation that the Greens should have the right to use it longer than they continued to sell Millbrae milk. On the contrary, the fair and reasonable implication was that the name should only be used in connection with the sale of milk produced by the owner of the ranch and dairy familiarly known by that name, and which name was even more important to be retained by the owner of the ranch than by one whose right to sell the milk depended upon a yearly contract. Nor was this contract terminated by defendant Mills, but plaintiff, for its own advantage, voluntarily terminated it by a three-months' notice, under the terms of the contract, and now insists that it may deprive defendant Mills of all use and benefit of the well-established name in disposing of his milk, while using the false name of "Millbrae" for selling the milk of a competing producer.

It is not necessary to review the cases cited by appellant, for the question involved is no longer an open one. In the case of *Joseph v. Macowsky*, 96 Cal. 521, 31 Pac. 914, it was said: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public as to the manu-

facturer of the article and the place where it is manufactured: *Browne*, Trade-Marks, §§ 71, 474; *Palmer v. Harris*, 60 Pa. St. 156; *Fetridge v. Wells*, 13 How. Pr. 385; *Hobbs v. Francais*, 19 How. Pr. 571; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436. In *Siegert v. Abbott*, 61 Md. 284, the court said: 'It is a general rule of law in cases of this kind that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels.''' If, at the time the partnership was dissolved, D. O. Mills had sold to his copartners the ranch and dairy, as well as his interest in the business of selling the milk there produced, the property in the trade name and the exclusive right to use it would have passed to the purchasers, and Mills could not have applied the name to another ranch or dairy and used it in the like business to the injury of the plaintiff. By the division of the partnership property and business coupled with the contracts for the sale of the same milk, the Greens acquired the right to use the trade name so long as they sold Millbrae milk; but they could not rightfully use it after they ceased to sell that milk, without wronging both Mills and the public. It does not aid the plaintiff's case that Marin county milk, which it now sells, is as good or even better than Millbrae milk. As was said in a similar case, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 993. For a full discussion of the questions principally involved in the case at bar, see the case last above cited, and, also, *Pepper v. Labrot*, 8 Fed. 29, and *Huwer v. Dannenhoffer*, 82 N. Y. 499. In *Atlantic Milling Co. v. Robinson*, 20 Fed. 217, it was held that the right to the symbol is inseparable from the right to make and sell the commodity which it has been appropriated to designate. *Pierce v. Guittard*, 68 Cal. 68, 8 Pac. 645, is en-

tirely consistent with *Joseph v. Macowsky, supra*, and is against appellant.

It is claimed that the second finding is, in effect, that defendant Mills first used and adopted the name "Millbrae" before his partnership with A. F. Green, and that this is not justified by the evidence. Whether this name was adopted before or after is wholly immaterial. It had certainly been used many years before the dissolution, and was well known. It was the name of a locality, and attached thereto, no matter by whom nor when it was originated. Whether Millbrae farm is or is not shown by the evidence to be "peculiarly" fitted and adapted to the purpose of producing milk, or that it is not shown to produce better milk than other farms or dairies, is also immaterial. The name used to indicate milk produced on that farm had become valuable, and the question here is not one of comparison with other milk or other ranches, but whether defendant Mills shall be deprived of the use of a name that is valuable to him. The finding that "D. O. Mills never sold nor conveyed to A. F. Green and F. H. Green nor to either of them, the good-will of the business of selling milk in the city of San Francisco," is, I think, supported by the evidence. The evidence shows that at the time of the dissolution of the copartnership four milk routes were operated. Those routes were not defined in the evidence. There was no agreement that Mills should not engage in that business in the city. Whatever might be said of the "routes" then operated, there is nothing in the evidence to indicate that he intended to exclude himself from the business of selling milk in the city, unless during the continuance of his contracts with his former partners. Besides, so far as the use of the trade name is concerned, the good-will of the milk routes is an immaterial factor. It was found by the court that Green & Green "were to take from D. O. Mills all the milk which might be necessary to carry on the said business;" and this, it is said, is not justi-

fied by the evidence. The agreement, as we have seen, specified a minimum and maximum quantity, and, while they did not contract not to buy or sell other milk, and the evidence shows that they sometimes did so, yet the finding is substantially true. It was a division of the business, and during the continuance of these contracts they advertised no other milk, and there is no evidence tending to show that it was not usually sufficient to supply their customers. The finding that the use of the word "Millbrae" was a representation to the public that the milk sold was produced at Millbrae farm or dairy is incontrovertibly supported by the evidence, as is also the finding that the use of the same word by the plaintiff after it ceased to sell Millbrae milk was a false representation. The assurance given by plaintiff to its customers that it was selling them Marin county milk could not have been necessary if the use of the word Millbrae did not imply that it was selling milk from Millbrae dairy.

It was further alleged in the complaint that defendants Taylor and Mills entered into a scheme which had for its object the going into the business of selling milk in said city, and of obtaining customers by enticing away the customers of the plaintiff; that in pursuance thereof they induced the defendant Cole, who had been in the employment of the plaintiff and its predecessors for fifteen years, and had full knowledge of their milk routes, to leave the plaintiff and enter into their service, and were thus able to impose upon the customers of the plaintiff and sell them milk while such customers believed they were purchasing from plaintiff; that defendants' wagons closely resembled plaintiff's, and had painted on them the words "Millbrae Dairy," and were run under the personal charge of defendant Cole, and by these means, and particularly by using the name "Millbrae," and having the same painted upon their wagons, and having them in charge of defendant Cole, have been drawing away plaintiff's customers, and allege damages in the

sum of \$500. Upon these issues the court found that no scheme was entered into; that none of plaintiff's customers were imposed upon, or bought milk from defendants when they supposed they were buying from plaintiff; that the wagons used by defendants do not resemble plaintiff's wagons; that none of plaintiff's customers have been drawn away, except by fair and open competition; that none of said customers were misled by the defendants' use of the trade name "Millbrae," and that plaintiff has not sustained any damage. Appellant claims that none of these findings are supported by the evidence. That defendants sold milk to a very considerable number of the former customers of plaintiff is not disputed. Whether defendants obtained these customers by improper means is a mixed question of law and fact; the means used being a question of fact, but whether such means were improper is a question of law, depending upon the relation of the parties, and their rights and duties towards each other. There is no doubt that plaintiff has sustained loss by the competition of defendants, but whether such loss is a legal injury, entitling the plaintiff to recover damages, is quite another question. The use of the trade name, so long used by plaintiff and its predecessors, must necessarily aid the defendants in securing custom, but, having the right to use it, plaintiff cannot complain. The circulars used by defendants for advertising their business were headed "Millbrae Dairy, of Millbrae, San Mateo County," and informed the people that they would sell their own milk, and further said: "Do not confound it with the Millbrae Company." We think these findings are fully justified by the evidence, notwithstanding the evidence shows that plaintiff suffered loss in consequence of what defendants did. Some of these findings, taken by themselves, are mixed conclusions of law and fact, and necessarily so. But they must be read in connection with the other findings, showing the relations of the parties and their rights and duties towards each other. Appellant con-

tends that "a person who sells the good-will of a business will be enjoined from again setting up business at such a place and in such a manner as to destroy or diminish the business of which he had sold the good-will; that the sole issue is between D. O. Mills, the vendor of the good-will of a business, and appellant, successor to his vendees." We think that the only good-will that was sold by Mills was the good-will of the routes then operated for the sale of Millbrae milk; that it was not the intention of Mills to shut himself out from them, nor from any part of the city, if his vendees should cease to sell his milk. His vendees might have exacted other conditions, but they did not do so. In the language of F. H. Green, it was a "division of the business" theretofore carried on by the so-called vendor and vendees as partners, and that business was the sale of Millbrae milk. Mills did not sell the good-will of the business of selling any other milk, as no other milk was sold, and his vendees could not divert the place where that business was conducted to the sale of a competing article, and shield themselves from his competition by claiming that the good-will continued, not only as to the place, but as to the place used for selling a different and competing article. This conclusion makes it unnecessary to consider the cases cited by appellant in support of the proposition that the vendor of the good-will of a business "must do nothing to impair or injure it" (a proposition which certainly requires material qualifications), or those other cases which undertake to specify with more or less particularity what the vendor who again enters upon a similar business may or may not do in furtherance of it.

I think the evidence justifies the findings, and that the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Any misrepresentation which is contained in a trade-mark or trade name, or which is used in connection with it by one claiming it as such, which misleads, or tends to mislead, the public, or the ordinary purchaser, as to the origin of the goods sold under the trade-mark or name, is such a fraud upon the public that equity will refuse to protect the mark or name against infringement. This rule has generally been applied to the case of manufactured articles, but it is equally applicable to a natural product. In *Perry v. Truefitt*, 6 Beav. 66, the court refused to protect the name "Medicated Mexican Balm," when it was accompanied by a circular stating that the article represented by it was an extract from vegetable balsamic productions of Mexico, and there was no evidence that such an assertion was true. In *Pidding v. How*, 8 Sim. 477, tea was sold as "Howqua's Mixture," and a circular intimated that the tea which gave the peculiar flavor to the mixture was of an especially valuable character, and was grown only in Kyiang Nau, and that the mixture was made by Howqua. The evidence showed that the mixture was not made by Howqua; that it was a tea well known to the trade, and that no black tea was produced in Kyiang Nau. The Vice-Chancellor said: "As the plaintiff in this case has thought fit to mix up that which may be true with that which is false in introducing his tea to the public, my opinion is that, unless he establish his title at law, the court cannot interfere in his behalf." In *Palmer v. Harris*, 60 Pa. 156, the plaintiff claimed protection for the trade-mark "Golden Crown," applied to certain cigars. On the label was the following: "Fabrica de Tabacos de las Majores Vegas de la Vuelta Abajo, Calle del Agua No. 75, Habana." This was wholly untrue, as the cigars were made in New York. The label also contained in very small letters an announcement of its register in the District Court clerk's office of Southern New York, and on the box was a United States revenue stamp. The foreign language, the stamp, and the copyright register were relied on by the plaintiff as neutralizing the words in Spanish. SHARSWOOD, J., however, said: "The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired

in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act," and, after referring to the fact that the copyright notice was in such small type that it would probably escape the observation of any one whose attention was not specially directed to it, that in itself it was not inconsistent with the declaration that the cigars were made in Havana and that few people know the difference between a revenue stamp used for domestic and one used for imported cigars, he continued: "It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one who can read that the cigars are from Havana. . . . It is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting." The decree refusing the injunction was affirmed. In *Hobbs v. Francais*, 19 How. Pr. 567, an injunction was refused when the label accompanying the trade name "Meen Fun," intimated that the article was made in London, when in fact it was made in New York. In *Joseph v. Macowsky*, 96 Cal. 518, a trade-mark, "Queen's Own Co., Sheffield," stamped upon razors by the seller (the plaintiff) without any evidence that they were made in Sheffield, or by whom, was refused protection; and see, also, *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523 (a very instructive case); *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Phalon v. Wright*, 5 Phila. 464; *Febridge v. Wells*, 13 How. Pr. 385; *Patridge v. Menck*, 2 Sandf. Ch. 622; 1 How. App. Cas. 558; *Fowle v. Spear*, 7 Pa. L. J. 176; *R. Cox*, 67; *Kenny v. Gilbert*, 60 Md. 574; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Siebert v. Abbott*, 60 Md. 276; *Connell v. Reid*, 128 Mass. 477; *Hegeman v. Hegeman*, 8 Daly, 1. Mere misrepresentation, which does not deceive the public with regard to that in which it is interested, *i. e.*, the character and origin of the goods covered by the trade-mark, will not induce the court to refuse an injunction in a case in which it would otherwise be granted, as when the word "copyrighted" is added to a label: *Solis Cigar Co. v. Pozo*, 16 Colo. 388; or "trade-mark registered."

C. T. Simmons Medicine Co. v. Mansfield Drug Co. (Tenn.), 23 S. W. 165; or the word "patent" or "copyright," "registration," or "patent existing," although such words convey a false impression, either through the fact that one has never been obtained or because it has expired or been declared invalid: *Lanferty v. Wheeler*, 63 How. Pr. 488, 11 Abb. N. Cas. 220; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; *Ransome v. Graham*, 51 L. J. Ch. 897; *Ford v. Foster*, L. R. 7 C. A. 611; *Marshall v. Ross*, L. R. 8 Eq. 651; *Edleston v. Vick*, 11 Hare, 78; *Sykes v. Sykes*, 3 B. & C. 541; but other cases hold that, under such circumstances, the insertion of the word "patent," without anything to show that it is not used with a fraudulent intent, will cause the court of equity to refuse the trade-mark, of which it forms a part, or with which it is connected, protection: *Consolidated Fruit Jar Co. v. Darflinger*, 6 Am. L. T. N. S. 511; *Cheavin v. Walker*, 5 Ch. D. 850; *Morgan v. M'Adam*, 36 L. J. Ch. 228; *Fravel v. Harrison*, 10 Hare, 467. The apparent misrepresentation may be purged, as where it appears that the words relied on as deceptive are such as to be capable of an innocent interpretation, such as in *Société Anonyme v. Western Distilling Co.*, 45 Fed. Rep. 416, or where they are accompanied by an explanation, to which such prominence is given as to negative any assumption that there is an intention to deceive: *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

After the dissolution of a partnership possessed of a trade-mark, any partner may continue to use the same until in some way he has divested himself of the right: *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Young v. Jones*, 3 Hughes, 274; *Robinson v. Findlay*, 9 Ch. D. 487; *Condy v. Mitchell*, 37 L. T. N. S. 268; *Weston v. Ketcham*, 39 N. Y. Super Ch. 54; *Bank v. Gibson*, 34 Beav. 566. This is subject to the qualification that ordinarily each partner retains control of his own name, if it has been used simply in the ordinary way in which names are used in partnerships, although it may have come to be practically a trade-mark in the eyes of the world: *Holmes v. Holmes*, 37 Conn. 278; *Scott v. Rowland*, 26 L. T. N. S. 391; *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Hoffman v. Duncan*, Seton, 256; but the name of a partner may have become a regular trade-mark, in which case it will be usable by all the former partners: *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 618.

Water-course—Diversion—Injunction.**RIGNEY v. TACOMA LIGHT AND WATER COMPANY
AND THE CITY OF TACOMA.**

(Supreme Court of Washington, October 15, 1894.)

A body of water having a bed, bank and current, is a natural water-course, although, at times, the water may be exhausted and the course be dry.

A natural water-course does not lose its character as such by the fact that its channel is artificially deepened for the purpose of drainage.

When a stream spreads out into a pond-like sheet, with currents, it still remains a water-course.

A riparian owner has no right to divert a stream permanently from its natural course, and the purpose to which he devotes the water makes no difference in the application of the rule.

The right of a riparian owner to the flow of water is annexed to the soil, not as a mere easement or appurtenance, but as part and parcel of it.

When a continued diversion of a water-course is threatened, equity will interfere by injunction to preserve the rights of the riparian owner therein.

To constitute an estoppel by conduct the person whom it is sought to estop must have done some act or made some admission which has influenced the action of the other party.

The effect of delay in depriving a plaintiff in equity of the right to maintain his suit is confined to claims for purely equitable remedies, to which the party has no legal right; where it is sought to sustain a legal right, mere delay, unaccompanied by circumstances amounting to an estoppel, for a time short of the period fixed by the statute of limitations, will not defeat a bill for an injunction.

When during violations of plaintiff's right by a defendant the former is told by the latter that the violations are temporary only, the plaintiff cannot be charged with laches in not bringing suit, although the delay be long continued.

Appeal from Superior Court, Pierce county.

Suit by Robert P. Rigney against the Tacoma Light and Water Company and the City of Tacoma, for an injunction to restrain the diversion of certain water-courses from the

plaintiff's lands. The Superior Court granted the injunction and the defendant appealed.

Charles A. Seymour and F. H. Murray, for appellants.
Baker and Campbell, for respondent.

ANDERS, J.—The respondent instituted this action to obtain an injunction against the Tacoma Light and Water Company, a duly organized corporation, to restrain it from diverting the waters, or any thereof, of Spanaway (or Bushalier) creek, and of Upper Clover creek, from their natural channels, or polluting the same, and to compel it to remove the dams, flumes, ditches and filters placed therein, or connected therewith, by said defendant, and to restore said waters to their natural bed or channel. That a large portion of the waters of the streams above mentioned have been and still are diverted therefrom, and carried by means of flumes and ditches to the city of Tacoma, and there consumed, is not disputed. The acts causing the diversion were all done by the water company, but after the commencement of this action it sold its plant to the city, and for that reason the city was made a party defendant by order of the court. The proof clearly shows that the plaintiff (respondent here) is the owner in fee of about 340 acres of land, which is used, and for a long time has been used, for agricultural purposes and for pasturing stock, and that the plaintiff resides thereon. The stream designated as "Upper Clover creek" originates in some springs several miles eastward from Smith's swamp, into which it flows. Spanaway creek, also called "Bushalier creek," is the outlet of Spanaway lake, and a short distance from its source it divides into two branches, one of which flows through "Tule lake" and into Smith's swamp or lake, on the east side thereof, and the other, known as "Morey creek," also flows into the same swamp at its southeastern extremity. The waters which thus unite in this swamp flow out of it at its westerly end, and form what is called "Clover creek," which flows

through the lands of the respondent. The evidence discloses that Smith's swamp covers an area of 100 acres or more, nearly all of which, in its natural state, was covered with water during the rainy season, but at other times of the year became comparatively dry except around the margin, where the water always remained. It must be conceded—in fact, it is not disputed—that the respondent is a riparian proprietor and entitled to all the rights of such proprietor, if Clover creek is a natural water-course. But whether it is such, and, if so, whether the waters diverted by the light and water company were any part of the waters thereof, were questions which were strongly controverted at the trial. It was contended on the part of the defendants that the streams from which said defendant abstracted the water for the use of the inhabitants of the city of Tacoma were not sources or tributaries of Clover creek, but that they ceased to be streams at all when they discharged their waters into Smith's swamp, for the alleged reason that they then and there entirely lost their identity and formed a distinct body of water having none of the essential characteristics of a water-course. The court, however, found, in effect, contrary to the contention of the defendants, that Clover creek was a natural water-course, whose source was not Smith's swamp, but the streams which were diverted by the defendants. The questions determined were questions of fact, and, upon the evidence in the record we are not prepared to say that the court arrived at an erroneous conclusion. There was considerable positive testimony tending to show not only that there were during a large portion of each year currents flowing through Smith's swamp from the points where it receives the waters of the streams in question to the outlet in Clover creek, but that such currents were confined to regular, well-defined channels. There can, we think, be little doubt that Lower Clover creek is an ancient water-course, notwithstanding the fact that its channel has been deepened artificially within the last ten or fifteen years

for the purpose of draining the swamp from whence it flows. From the time of the earliest settlement of the country it has flowed in a definite and easily distinguished channel, and was seldom—perhaps never—dry, prior to the commission of the acts complained of. Having a bed, banks and current, it is a natural water-course, even although it may at times be dry: Gould, *Waters*, § 41. Both Spanaway creek and Upper Clover creek are virtually conceded to be natural streams of water, and the mere fact that their united volume spreads out into a broad sheet, with currents, covering a large area of low ground, to which the appellation of swamp or lake has been given, does not deprive them of their character as water-courses. Upon the question of whether a given body of water is a lake or pond or river, Gould, in his work on *Waters* (§ 79), says: "The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake, nor does a lake lose its distinctive character because there is a current in it for a certain distance, tending towards a river which forms its outlet. On the other hand, the fact that a river broadens into a pond-like sheet with a current does not deprive it of its character as a river. Where it is admitted or not denied, that the water is not a lake or pond, the material difference between which is in size, the only criterion by which to determine whether it is a river is the existence of a current, and this question cannot be answered by ascertaining what appellations have been given to it." In a late and well-considered case in Wisconsin, the Supreme Court of that state held that the fact that a stream spread over wide reaches of marshes and swamps, on or below the surface, did not militate against its being a water-course in every essential particular, so long as it could be identified as the same stream; and the identity of the stream through the marshes and swamps was in that case disclosed solely by its current, there being no defined channel or channels whatever: *Case v. Hoffman*, 54 N. W. 793.

Viewed in the light of these authorities and others which might be cited, we are of the opinion that the facts in this case fully justified the trial court in concluding that the waters diverted by said defendant were the waters of Lower Clover creek. And it being conceded that the water company has been diverting the water for several years last past, in large quantities, and not returning any portion so taken to the channels in which it was accustomed to flow, it has, during all of said time, been engaged in the commission of unlawful acts, whether it was or is a riparian proprietor at the particular points where such diversions have been made or not. Not even a riparian owner has a right to divert a stream permanently from its natural course, and thus deprive others of their rights therein. Such an act in itself is wholly unlawful: *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28. And the purpose for which the water diverted may be used makes no difference as to the force and effect of this rule. Accordingly it is said by Kerr that a diversion of water from a stream for the purpose of supplying a neighboring town with water, is not a lawful user of the water: *Kerr, Inj.* (2d ed.), § 229. But in this case the defendants, in their answers, undertake to justify their acts on the alleged grounds: First, that on May 21, 1884, one James Rigney, plaintiff's ancestor and grantor, for a good and valuable consideration, and by an instrument in writing, which was duly recorded in the office of the auditor of Pierce county, granted to the defendant water company the right to take and use the waters, for the taking and using of which this action was brought, and released and discharged said defendant from any and all claims for damages on the part of said James Rigney, his heirs or assigns, including plaintiff, on account of taking said waters, or any part thereof; and, second, that the plaintiff was at all times fully informed of the operations of the light and water company, and of the city as its successor and grantee of all its interests, and without protest or objection allowed the said water company to

make its connections, build its structures and take the water for the use of the city, and is thereby estopped from maintaining this action. As to the first ground of justification above mentioned, but little need be said. It was not specially pressed at the hearing in this court. The written instrument referred to, although purporting upon its face to be the contract or covenant of James Rigney and Ann Rigney, his wife, was not executed by the latter, and, upon her refusing to do so, the former at once informed the company of the fact, and notified its superintendent that the contemplated agreement was at an end. Besides, it does not appear that the water company ever complied with the conditions set forth in the instrument and which were necessary to give it force and effect. Nor does it appear from the evidence that the company really at any time relied upon this writing as authorizing it to divert the water from the premises now owned by the respondent. In fact, judging by the acts and declarations of the company's agents when objections were made to its using the water, we think no such claim as we are now considering was ever made or seriously entertained prior to the commencement of this action. The fact that the instrument was placed upon the public records of the county by the company is a matter of little or no consequence under the facts and circumstances disclosed by the evidence.

Before entering upon a discussion of the question whether or not the respondent has by his own laches or acquiescence forfeited any right he might otherwise have had to the relief demanded, we will briefly consider two other points raised by the learned counsel for the appellants, viz. : (1) That the wrongs complained of are theoretical, and the causes of damage, if any exist, are at best uncertain; and (2) that the complainant has an ample and adequate remedy at law for the redress of the injuries alleged, if such really exist. Are the wrongs complained of in fact theoretical? They certainly are not, if any of the substantial

rights of respondent have been wrongfully invaded by the appellants. The legal rights of riparian proprietors upon natural water-courses are well settled and generally understood. Every such proprietor is entitled, in the absence of grant, license or prescription limiting his right, to have the stream which passes over or adjacent to his lands flow as it is wont by nature, affected only in quantity or quality by the consequences of reasonable use thereof by other proprietors. See *Crook v. Hewett*, *supra*, and *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. The right of the riparian proprietor to the flow of the water is inseparably annexed to the soil, and passes with it not as a mere easement or appurtenant, but as a part and parcel of it. Use does not create, and disuse cannot destroy or suspend, it: *Johnson v. Jordan*, 2 Metc. (Mass.) 239; *Lux v. Haggin*, *supra*. The riparian proprietor has no property in the water itself but a simple usufruct while it passes along: 1 Wood, Nuis. (3d ed.), p. 471. The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament: *Cary v. Daniels*, 5 Metc. (Mass.) 238. And this right is a substantial one, and may be the subject of sale or lease, like the land itself: 1 Wood, Nuis. (2d ed.), p. 412. The respondent, having this clear legal right to the natural flow of the waters of Clover creek over his lands, cannot be unwillingly deprived of it without compensation or due process of law, even by the public, or for a public use, without disregarding the fundamental law of this state. Even if his damages were shown to be slight, or merely nominal (which is not shown), the right still exists, and cannot be violated with impunity. Actual damage is not indispensable as the foundation of an action. It is sufficient to show a violation of a right. The law will then presume some damage. And when the act done is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, its repetition or continuance will be restrained by injunction: *Webb v. Manufacturing Co.*,

3 Sumn. 189, Fed. Cas. No. 17,322. In all such cases a court of equity is the only tribunal competent to grant speedy and adequate relief; and it will not withhold its aid simply because the injuries sought to be redressed may not be the cause of great pecuniary damage. While a court of equity will not undertake to correct merely theoretical or imaginary wrongs, it will never refuse its aid, in cases where it has jurisdiction, to enforce clear legal rights, however small they may appear when viewed from a merely pecuniary standpoint. Concerning this question, Mr. Wood well says: "But if the legal remedy does not afford that relief to which the party in equity and good conscience is entitled, the smallness of the damages on the one hand, or the magnitude of the interest to be affected on the other, will not prevent the exercise of the preventive power of the court. Indeed, it was remarked in one case by an eminent jurist whose opinions are entitled to great weight: 'Even slight infringements of rights by a large company of persons ought to be watched with a careful eye, and repressed with a strict hand by a court of equity, where it can exercise jurisdiction;'" 2 Wood, Nuis., p. 1151.

Is the appellants' further contention that the respondent is not entitled to an injunction because he has an ample and adequate remedy at law well founded? We think it is not. While it is perhaps true that the respondent may recover in an action at law such damages as he may be entitled to on account of past injuries, he can hardly be said to have a present legal remedy for the injuries which may and probably will be inflicted upon his property in the future by a continuance of the wrongs complained of. The mere fact that he may bring a separate action for each recurring injury does not prove the adequacy of the legal remedy. Indeed, there is no adequate and effectual relief from a constantly operating injury save that of prevention. And no court can exercise direct preventive power but a court of equity. It follows, therefore, that the respondent is entitled

to have the appellants restrained from further diverting the waters of the creek from his land, and compelled to restore them to their natural channels, unless he has so far waived his rights that it would now be inequitable to enforce them by means of an injunction. It must be borne in mind that the statute of limitations is neither pleaded nor relied on as a defense to this action. It is asserted, in the brief of counsel, that the plaintiff has virtually slept upon the rights he now claims for a period of ten years, and allowed the defendants to expend a large sum of money in structures and improvements, knowing that they were relying upon his silence and upon the grant obtained from his ancestor and grantor, James Rigney. We have already expressed our views as to the force and effect of the alleged "grant" from James Rigney, and will, therefore, say nothing further upon that subject. And, as to the rights of the plaintiff which he now claims, it seems that they did not arise until after most, if not all, of the defendants' structures and improvements had been erected and made, for he did not become the owner of the lands described in the complaint until the years 1890 and 1891, if we have correctly ascertained the dates of his respective deeds. Since he acquired his title it can hardly be said that he has done or said or failed to do or say anything which can give rise to an estoppel. But conceding, without deciding, that if the defendants had acquired a right of diversion as against plaintiff's grantors, their right was not destroyed by the conveyance to the plaintiff, the question then is, were the plaintiff's grantors entitled to equitable relief as against the defendants at the time of the transfer? Now, the case as made by the proofs seems to be wanting in the essential elements of an estoppel proper. An estoppel is well defined by Judge PECKHAM in *Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. 269, cited by respondent, as follows: "To constitute it (an estoppel), the person sought to be estopped must do some act or make some admission with an intention of influencing the con-

duct of another, or that he has reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." It is not shown that either the plaintiff or his grantor did any act or made any admission with the intention of influencing the conduct of the defendants, or that the latter did the acts complained of by reason of any acts or admissions on the part of the former. The principle of estoppel is therefore inapplicable here. But it is claimed that at all events the kindred and analogous principle of acquiescence or laches, is applicable, and constitutes a complete bar to the action. It is true that this action was not commenced against the defendant corporation until nearly nine years after it began to divert the water from the premises now owned by the plaintiff. It is also true that courts of equity, in the exercise of a sound discretion, have often refused relief to suitors soliciting their intervention who have failed to assert their rights in court as promptly as they should have done; but it by no means follows that in no case will relief be granted in equity where there has been considerable delay in applying for it. It is often remarked by courts and text-writers that courts of equity will refuse relief to stale demands, but "even in cases where delay is allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case." *Galway v. Railway Co.*, 128 N. Y. 132, 28 N. E. 479. If it appears in any particular case that the laches of the complainant have not been such as to show his assent to the acts complained of and their consequences, he ought not to be turned out of court simply because he might have begun his action sooner. In *Lux v. Haggin*, *supra*, in speaking of acquiescence as a defense in an action for an injunction, the court said: "It may fairly be deduced from the authorities we have consulted that the acquiescence which will bar a complainant from

the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts. If a degree of acquiescence less than establishes such assent has been regarded in any decision, it will be seen that it has been treated merely as tending to prove some other fact which rendered it inequitable to grant a preventive order." In that case the authorities cited by the appellants in this case to sustain their position, and many more not here cited, were fairly and ably reviewed, and from them the court very properly, in our judgment, deduced the propositions of law above quoted. The object of that action was to enjoin a canal company from diverting the waters of Kern river from the premises of the plaintiff, and one of the defenses was that the plaintiff was estopped from objecting to the diversion by reason of the fact that the ditches used in diverting the water were constructed at great expense, with his knowledge, and without objection or protest by him—a defense similar to that now under consideration. Touching this question, Mr. Pomeroy remarks: "Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences. It must be voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrong-doer to enforce the peculiar remedies of equity

against him, after he has been suffered to go on unmolested, and his conduct apparently acquiesced in. It follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances. . . . This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is established. Mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself:" 2 Pom. Eq. Jur., § 817. The important limitation of the effect of delay mentioned by that learned author is sometimes apparently overlooked, or not properly applied; and laches and acquiescence are often referred to, in general terms, as defenses in all equitable actions, limited only by the court's discretion. None of the flumes, dams or other structures erected by the defendant company for the purpose of conveying water to the city of Tacoma were erected or placed on the premises of the plaintiff, and therefore neither he nor his grantors had a right to object to their being so constructed, even if they were fully apprised of the character and extent of the same, which is not at all certain. Moreover, the company acted with full knowledge of the rights of plaintiff's grantors, as is shown by its having undertaken to secure them for a pecuniary consideration. As a matter of fact the record is destitute of proof that the wrongful acts here complained were ever acquiesced in or assented to, unless the mere abstaining from legal proceedings must necessarily be regarded as such proof; and we must decline to so regard it. The evidence shows that the water company was, from time to time, up to at least the year 1889, remonstrated with against diverting these streams, and that, whenever objection was made, a portion of the water would be turned into its natural channel. Nor is this all. The company's super-

intendent, when complaint was made to him, assured plaintiff that the use of the water was not intended to be permanent, but only temporary, and that the then source of supply would be soon abandoned, and the water for the use of the city obtained elsewhere. These facts alone would be sufficient to justify the delay in bringing this action, if such justification were necessary. There is nothing in the case showing that the injuries inflicted upon the property of the plaintiff were perpetrated with the owner's consent, nor anything from which his consent can be justly inferred.

In the case of *Galway v. Railway Co.*, *supra*, the question of acquiescence as an equitable defense was directly involved, and was discussed with great learning and acumen by Chief Justice RUGER. The action was brought to restrain the defendant from further maintaining and operating an elevated street railway on Sixth avenue, in the city of New York, adjacent to plaintiff's property. The plaintiff saw the railroad in the course of construction in front of his premises, and from time to time saw what the defendants were doing in respect thereto, and occasionally, as a passenger, rode upon it. He subscribed money to pay for counsel to prevent the erection of the road; but otherwise made no protest, and delayed instituting legal proceedings to enjoin its operation until more than ten years had elapsed from the time the road was constructed; and under that state of facts it was held that the plaintiff was entitled to an injunction. The trial court had refused to find, at the request of the defendant, "that plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger, and that he is estopped from maintaining the action;" and upon that proposition the Court of Appeals, citing numerous authorities, said: "The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal

right has expired or the party has lost his right of property, by prescription or adverse possession. Whatever may be the rule in other states, it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. The principle that, so long as the legal right exists, the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court." It was further said that that court had uniformly adhered to the doctrine that where a legal right is involved, and upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal rights, the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to such action, and that such is the doctrine generally of the elementary writers. The same rule was briefly, though clearly, announced by Chief Justice FULLER, in *Menendez v. Holt*, 128 U. S. 523, 9 Sup. Ct. 143, where, speaking for the court, he said: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long, and under such circumstances, as to defeat the right itself." In this case the respondent's right to use and enjoy the water which would naturally flow over his lands, if not diverted by the defendants, is clear and positive, and has neither been waived by delay nor forfeited by acts or admissions amounting to an estoppel. For years he has been, and still is, interfered with in the enjoyment of that right. He now asks a court of equity to protect him from further injury and annoyance, and we think he is entitled to the injunction awarded by the trial court. The judgment is therefore affirmed. But, in order to afford the defendant city an opportunity to acquire the right from the plaintiff, by legal proceedings or otherwise, to divert the water heretofore wrongfully diverted from plaintiff's premises, the decree of the court below will not be opera-

tive or take effect until ninety days from and after the date of the filing of this opinion.

DUNBAR, C. J., and SCOTT, J., concur.

HOYT, J.—I cannot concur in that part of the foregoing opinion which holds that actual damage is not indispensable as the foundation for an action of this kind. In my opinion, a court of equity will not interfere for the protection of the rights of a party under the circumstances shown by this record until it is made to appear not only that some of them are being violated, but also that such deprivation has resulted, or is likely to result, in substantial damage. In this case I think the proofs warrant the holding that there was substantial damage to the plaintiff by the acts of the defendant, and I therefore concur in the affirmance of the judgment.

STILES, J. (dissenting.)—I have examined the authorities upon which the court bases the foregoing opinion, and do not find any of them exactly in point in this particular case, where a public municipal corporation, having the power of eminent domain, is concerned. In support of my view that injunction should not lie, I quote the syllabus in *City of Logansport v. Uhl*, 99 Ind. 531: "Where the owner of a water-power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream, and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law." This was a unanimous decision, where the time elapsed was only three years.

A water-course is a stream of water flowing usually in a well-defined course: *Schlichter v. Phillipy*, 67 Ind. 201; banks have been considered necessary to constitute a water-course: *Hoyt v.*

City of Hudson, 27 Wisc. 656; *Embrich v. Richter*, 37 Ib. 226; *Benson v. C. & A. R. R. Co.*, 78 Mo. 504; but the banks need not be unchangeable, the flow constant, the size of the stream uniform, the water unmixed with earth, or flowing with any regular velocity: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; *Pyle v. Richards*, 17 Neb. 180; *Gillette v. Johnson*, 30 Conn. 180. A channel is necessary, mere surface water draining over the land is not a water-course: *Hoyt v. City of Hudson*, *supra*; *Gregory v. Bush*, 64 Mich. 37; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Ib. 192; *Shields v. Arndt*, 4 N. J. Eq. 234; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Ib. 601; *Benson v. C. & A. R. R.*, *supra*; *C. K. & W. R. Co. v. Morrow*, 42 Kan. 339; but in *Palmer v. Waddell*, 22 Kan. 352, it was held that when surface water, which had no definite source, but was supplied from falling rains and melting snows from highlands, was forced, owing to the nature of the ground, to seek an outlet through a ravine, and by its flow assumed, at certain regularly recurrent seasons, a definite or natural channel, it was a natural water-course; and see *Schnitzius v. Bailey*, 48 N. J. Eq. 409, 11 Cent. 757; *Kelly v. Dunning*, 39 Ib. 482; *Earl v. De Hart*, 12 N. J. Eq. 280 (as limited by *Bowlsby v. Spear*, 31 N. J. 235); but the mere existence of a ravine, dry at most times, into which surface water occasionally runs, will not constitute a water-course: *Lessard v. Stram*, 62 Wisc. 112; *Jones v. W. St. L. & P. Ry. Co.*, 18 Mo. App. 251; a continuous flow of water all the year round is not necessary to make a water-course: *Embrich v. Richter*, *supra*, s. c. 41 Wisc. 318; *Fryer v. Warne*, 29 Ib. 511; *Shields v. Arndt*, *supra*; *Shively v. Hume*, 10 Oreg. 76; *Pyle v. Richards*, 17 Neb. 180; *Ferris v. Wellborn*, 64 Miss. 29; *Murchiesson v. Gates*, 78 Me. 300; *Dority v. Dunning*, Ib. 381; a lake in which there is a sensible current is a water-course: *Hebron Gravel Road Co. v. Harney*, 90 Ind. 192. The existence of a water-course does not depend on the length of the stream above the land of the person claiming the same; it is a course even if it arise from a spring on the land of the person who attempts to divert it and it flows to that of the claimant: *Chauvet v. Hill*, 93 Cal. 407. The fact that a stream is subterranean does not deprive it of its character as a water-course if it flow in a known

and defined course: *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. A. 483; *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Saw. 470; *Hanson v. McCue*, 42 Cal. 303; *Taylor v. Welch*, 6 Oreg. 198; *Shively v. Hume*, *supra*; *Hale v. McLea*, 53 Cal. 578; *Cross v. Kitts*, 69 Ib. 217; *Strait v. Brown*, 16 Nev. 317; *Burroughs v. Saterlee*, 67 Iowa, 396; *Redman v. Forman*, 83 Ky. 214; *Colrick v. Swinburne*, 105 N. Y. 503.

A water-right has generally been considered as a right or easement incident or appurtenant to the land through which it flows and which it benefits: *Mason v. Hill*, 5 B. & A. 1; *Chesmore v. Richards*, L. R. 7 H. L. 349; *Kensit v. Ry. Co.*, L. R. 27 Ch. D. 133; *Wood v. Ward*, 3 Exch. 748; *Lord v. Commissioners*, 12 Moo. P. C. 473; *Lyon v. Fishmonger Co.*, L. R. 1 A. C. 673; *Ashley v. Pease*, 18 Pick. 268; *Rackley v. Sprague*, 17 Me. 281; *Dority v. Dunning*, 78 Ib. 381; *Blake v. Clark*, 6 Greenl. 436; *Whitney v. Olney*, 3 Mason, 210; *Pickering v. Stapler*, 5 S. & R. 107; *Blaine's Lessee v. Chambers*, 1 Ib. 169; *Pollitt v. Long*, 58 Barb. 20; *Morgan v. Mason*, 20 Oh. 401; *Kilgour v. Ashcom*, 5 H. & J. 82; but it is held that the right may exist in gross: *Wentworth v. Philpot*, 60 N. H. 193; *Goodrich v. Burbank*, 12 Allen, 459; *Hill v. Newman*, 5 Cal. 445; *Hall v. Ionia*, 38 Mich. 493; *Winchell v. Clark*, 68 Mich. 64; and *SHAW, C. J.*, in *Johnson v. Jordan*, 2 Metc. 234, denied that a natural water-course was an appurtenance, saying: "It is inseparably annexed to the soil, and passes with it not as an easement nor as an appurtenance, but as part of it. Use does not create it and disuse cannot destroy or suspend it. Unity of possession and title in such lands with the lands above or below does not extinguish or suspend it."

A riparian owner has no right to divert water from its regular course, the maxim governing the rights of riparian owners being "*Aqua currit et debet currere ut solebat currere.*" *Howell v. McCoy*, 3 Rawle, 256; *Wadsworth v. Tillotson*, 15 Conn. 366; *Tyler v. Wilkinson*, 3 Mason, 387; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Pillsbury v. Moore*, 44 Me. 154; *Stevens v. Kelley*, 78 Me. 445; *Cowles v. Kidder*, 24 N. H. 364; *Evans v. Merriweather*, 4 Scam. 492; *Davis v. Fuller*, 12 Vt. 178; *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan. 24; *Coffman v. Robbins*, 8 Oreg. 278; *Clark v. Penna. R. R.*, 145 Pa. 438; a diversion can-

not be justified by the fact that the stream originates on the land of the divertor : *Howe v. Norman*, 13 R. I. 485 ; *Colrick v. Swinburne*, *supra* ; *Chauvet v. Hill*, *supra* ; or that it is necessary for the protection or promotion of a work in which the public has an interest : *Union Pac. Ry. Co. v. Dyche*, 31 Kan. 120 ; *Weiss v. Oregon Iron, etc., Co.*, 13 Oreg. 494 ; *E. St. Louis O. C. Ry. Co. v. Eistentraut*, 34 Ill. App. 563 ; *O. & M. Ry. Co. v. Singletary*, Ib. 425 ; *Penna. R. R. Co.'s Appeal*, 125 Pa. 189 ; or even that the work is a direct benefit to the public or portions of it, as where the diversion is to supply water to persons at a distance from the stream : *Haupt's Appeal*, 125 Pa. 211 ; *Ulbricht v. Eufala Water Co.*, 86 Ala. 587 ; *Heilbron v. Canal Co.*, 75 Cal. 426 ; *Gilchrist v. Vandyke*, 63 Vt. 75 ; and a riparian owner has no right to change a course from a natural to an artificial one for the purpose of protecting his land against the flow in high-water times, if by such diversion he injures a lower owner : *Kay v. Kirk* (Md.), 24 Atl. 326, and see *Rummell v. Lamb*, 100 Mich. 424.

The test of the violation of a water-right is found in answer to the question, has the flow of water been appreciably or materially lessened, irrespective of whether or not the user previously enjoyed by the owner of the right has been materially affected : *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293 ; *Centralia Trout Club v. Centralia Sporting Club*, 8 Oh. C. C. 194, and see *Miller v. Miller*, 9 Pa. 74.

An injunction will issue to protect the legal right to the proper flow of water in a natural stream : *Kerr on Inj.* (Blackstone ed.) 257 ; *Attorney-Gen. v. Great Eastern Ry. Co.*, L. R. 6 Ch. 577 ; *Grand Junction Canal Co. v. Shugar*, Ib. 483 ; *Swindon Water-Works' Co. v. Welty and Bucks Canal, etc., Co.*, L. R. 7 E. & I. App. 697 ; *Roberts v. Richards*, 50 L. J. Ch. 297 ; *Ferrand v. Corp. of Bradford*, 21 Beav. 412 ; *Atchison, T. & S. F. Ry. Co. v. Long*, 46 Kan. 260, 701 ; *Conkling v. Pacific Improvement Co.*, 87 Cal. 296 ; *Schnitzius v. Bailey*, 48 N. J. Eq. 409 ; *Crook v. Hewitt*, 4 Wash. 749 ; *Bartlett v. O'Connor* (Cal.), 36 Pac. 513 ; *Saunders v. Bluefield W. & I. Co.*, 58 Fed. Rep. 133 ; although the plaintiff has another large water-course running across his land : *Atchison, T. & S. F. Ry. Co. v. Long*, *supra* ; *Hastings v. Livermore*, 7 Gray, 194, 15 Ib. 10 ; and although the

actual damages may be difficult of ascertainment: *Gilchrist v. Vandyke*, *supra*; *Chace v. Warsaw Water-Works*, 79 Hun, 151; where damages are merely nominal, or are not shown at all: *Rochdale Canal Co. v. Ring*, 2 Sim. (N. S.) 79, 16 Beav. 630; *Mott v. Ewing*, 90 Cal. 231; *Spargur v. Heard*, *Ib.* 221; as an invasion of a right which is calculated to found a claim which may in time ripen into an adverse right is sufficient to call for the interposition of a court of equity: *Young v. Bankier Distillery Co.*, (H. L. Sc.) [1893] A. C. 691. The injunction may issue before the right is established at law: *Gardner v. Newburgh*, 2 Johns. Ch. 162; and, ordinarily, equity will take jurisdiction: *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; and see *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Farrell v. Richards*, 30 *Ib.* 511; *Wilcox v. Wheeler*, 47 N. H. 488; *Nininger v. Norwood*, 72 Ala. 277; *Ogeltree v. McQuaggs*, 67 *Ib.* 589; but in *Prentiss v. Larnard*, 11 Vt. 135, the court refused to take jurisdiction in equity to settle the legal right of a water-course, and sent the parties to a court of law. By laches, however, a riparian owner may lose his right to an injunction, at least in the first instance, and may even be confined to an award of damages or sent to seek compensation at law: *Penna. R. R. Co. v. Mullin*, 125 Pa. 189; but mere delay will not, it is thought, be visited, as a rule, with any more severe penalty than that of sending the plaintiff to a court of law to establish his right as a preliminary: *Reid v. Gifford*, 6 John. Ch. 20; *Goodall v. Crofton*, 33 Oh. St. 277; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71, 79. An injunction may not only restrain further diversion, but may be mandatory. See *Kerr, Injunctions*, 258.

Right of taxpayer to bring suit to enjoin municipal action.

AVERY ET AL. v. JOB ET AL.

(Supreme Court of Oregon, April 3, 1894.)

A taxpayer has a right to file a bill to enjoin the waste of public moneys.

Though the purchase or erection of water-works be a matter within the discretion of the city council, yet equity will, at the suit of taxpayers, restrain their purchase, for \$28,000, of works worth only \$10,000, and inadequate and unsuited to the purpose.

Where a city charter authorizes the council to buy or build and conduct water-works, and to that end to issue and sell bonds to a certain amount, whereby the city shall be deemed to promise to pay to bearer the sum named, with interest; to establish and collect water rates, whose proceeds shall be kept as a separate fund, and only used for expenses and improvements on the works and interest on the bonds, all the surplus to go to a sinking fund to pay the principal when due, the sinking-fund clause having no express provision to the contrary, the city is generally and primarily liable for the payment of such bonds, and resident taxpayers have the right to sue to enjoin their improper issue.

Appeal from the Circuit Court, Benton county, J. C. FULLERTON, Judge.

This was a suit by R. Avery and others, taxpayers of the city of Corvallis, against B. R. Job and others, common councilmen of the said city, and others, praying an injunction against the purchase of certain water-works and the issue of municipal bonds in payment therefor. The defendants demurred to the complaint. The demurrer was overruled and the injunction issued. The defendants took this appeal.

R. S. Strahan, for appellants; *John Kelsay*, for respondents.

BEAN, J.—This is a suit brought by certain residents and taxpayers of the city of Corvallis to restrain the mayor, police judge and members of the common council of said city from purchasing the plant of the Corvallis Water Com-

pany, and issuing bonds for the purpose of raising money to pay therefor.

The case, as exhibited by the complaint, is that, on the 13th day of July, 1892, the common council duly passed an ordinance providing for a special election to be held on the 29th day of August, 1892, for the purpose of voting on the question of issuing bonds for the erection or purchase of water-works as provided by subdivision 2 of section 37 and section 182 of the city charter, and designating the places in said city for holding such election, appointing judges and clerks thereof, and also directing the police judge to give ten days' notice in some local newspaper of the places designated for holding the election, and the names of the judges and clerks appointed to conduct the same, and the purpose of said election. In pursuance of this ordinance the police judge gave the notice as required, and, on the day appointed, an election was held in the city, resulting in a majority of the votes cast thereat being in favor of the issuance of said bonds. On the 26th of December, 1892, the council passed Ordinance No. 45, accepting a proposition of the Corvallis Water Company, made December 12, 1892, offering to sell to the city of Corvallis its water-works, fixtures and appurtenances thereto belonging, for the sum of \$28,000, and contracted with the said company to purchase and pay for the same, and directed the police judge to enter into a contract to that effect, stipulating therein that the \$28,000 should be paid out of the proceeds of the bonds so voted, as soon as the money could be realized thereon. On the 9th of January, 1893, an ordinance was passed declaring the result of the special election, and providing for the issuance of the bonds of the city in the aggregate sum of \$50,000, for the purpose of erecting or purchasing water-works, to be executed by the mayor and police judge, and to be dated April 1, 1893, payable twenty years from the date thereof, and to bear interest at the rate of six per cent. per annum, payable semi-annually in United States gold coin, both interest and principal

payable at Corvallis; also directing the police judge to advertise for proposals to purchase said bonds, and to sell and deliver the same. In pursuance of this ordinance, notice was given that proposals would be received up to, and opened on, the 10th day of March, 1893, for the purchase of the bonds. On the 13th day of March the council proceeded to consider the bids which were made in response to said notice, and by ordinance accepted the proposal of Lamprecht Bros. & Co., and directed the police judge to enter into a contract in writing with them for the sale of such bonds; but before the purchase of the water-works was consummated, or the bonds delivered, this suit was commenced. The complaint alleges that the plant of the Corvallis Water Company, proposed to be purchased by the city, is not worth more than \$10,000, is inadequate and faulty in construction, and wholly insufficient in every respect to supply the said city and its inhabitants with good, pure and wholesome water; that the price agreed to be paid therefor is \$18,000 in excess of its value, and that the proposed outlay, if consummated, will be an unreasonable and flagrant misappropriation of the city's resources; that the proceedings of the council in reference to the issuance of the bonds are void and of no effect, because neither the ordinance providing for the special election nor the notice thereof states or submits to the voters the question as to the amount of bonds to be issued, or the character or probable cost of the works the council contemplated erecting or purchasing. To the complaint a general demurrer was sustained, and, defendants refusing to plead further, a decree was rendered in favor of plaintiffs, from which this appeal is taken.

It is first insisted, in support of the demurrer, that, under the charter, the loan evidenced by the bonds issued for the purpose of raising money to erect or purchase water-works is not a debt or obligation of the city, for the payment of which money raised by taxation can be used, and therefore,

plaintiffs do not show any interest in the subject-matter of the suit or injury to themselves, present or prospective, from the contemplated issue of bonds or the purchase of the water-works. This argument is based upon the provision of the charter which, after authorizing the council to construct or purchase, keep, conduct and maintain water-works, to furnish the city and its inhabitants with pure, wholesome water, and for such purpose to issue and dispose of the bonds of the city, the par value of which shall not exceed \$50,000, whereby the city shall be held and considered in substance and effect to undertake and promise to pay to the bearer of each of said bonds, at the expiration of such time as the council shall prescribe, not exceeding twenty years, the sum named therein, with interest at the rate of six per cent. per annum, and to establish and collect water rates, further provides that "all moneys collected from water rates shall be kept separate from all other funds, and shall be known as the 'water fund,' and shall only be used to pay the costs incurred by the city in operating such water-works, and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this Act; and all the surplus collected from water rates shall go to create a sinking fund with which to pay the principal of such bonds at maturity." The argument is that by this provision of the charter the money collected for water rates is made a special fund for the payment of the interest on the bonds as it accrues, and for the creation of a sinking fund for their payment at maturity, and that it is the only fund out of which such bonds, or the interest thereon, can be paid. As a general rule, when the legislature authorizes a municipality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the Act itself, or some general limitation upon the power of taxation; which repels such an inference, and, although a special tax or

fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way. The bonds, when issued, become a debt of the corporation for which it is primarily liable, and for any balance due thereon after the application of the special fund the holders are entitled to payment out of a general fund of the corporation. In *U. S. v. County of Clark*, 96 U. S. 211, the county had subscribed for stock of a railroad company, and issued its bonds in payment therefor, pursuant to the law which authorized the levy of a special tax to pay them, "not exceeding one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the fund so derived should be applied to their payment. On an application for a writ of mandamus by the holders of the bonds to compel the clerk of the county to draw a warrant on the county treasurer, payable from the general fund of the county, for the balance due on the bonds after the application of the proceeds of a special tax, the court held that the bonds were debts of the county as fully as any other liability, the special tax being merely an additional provision for their payment, and for any balance remaining due thereon of either principal or interest, after the application of the proceeds of the special tax, the holders were entitled to payment out of the general fund of the county. In *Lowell v. Boston*, 111 Mass. 460, the Supreme Court of Massachusetts, in speaking of bonds which the city of Boston was authorized to issue by an Act of the legislature to enable it to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city destroyed by fire in November, 1872, which Act established a sinking fund for the payment of such bonds, to consist of all premiums on the sale of bonds above their par value, of all receipts of interest on loans made over and above the interest paid on such bonds, and of all payments of the loans made under the authority of the Act, said: "The issue of the bonds by

the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the same purport is *Hasbrouck v. Milwaukee*, 25 Wis. 122; *Ex parte Parsons*, 1 Hughes (U. S.) 282, Fed. Cas. No. 10,774, *Knox County Court v. U. S.*, 109 U. S. 229, 3 Sup. Ct. 131; *U. S. v. New Orleans*, 98 U. S. 381. "Indeed," as was said by Mr. Justice FIELD in the case last cited, "it is always to be assumed, in the absence of clear restrictive provisions, that, when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that payment shall not be left to its caprice or pleasure. When, therefore, power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome, except by express words excluding it." Now, in this case there are no express words in the charter excluding the implication that the bonds to be issued for water-works may be paid out of the general fund of the city; on the contrary, it clearly appears that the provision of the charter making water rates applicable to the payment of the bonds was only intended as an additional provision for the payment of the proposed new debt, and not as a denial to the bondholders of the right to resort to the ordinary revenues from which payment of the debts of the city is made. It does not, in express terms or by implication, import that they were thereby to be precluded from looking to the city for the payment of the debt. By the terms of the Act authorizing the bonds it is expressly provided that the city shall "be held and considered in substance and effect to undertake and promise, in consideration

of the premises, to pay to the bearer of each of the said bonds, at the expiration of such time as the council shall prescribe, not exceeding twenty years, the sum named therein, in gold coin of the United States, together with interest thereon in like gold coin at the rate of six per cent. per annum, payable half-yearly as provided in said coupons." The plain import of this language is that the city is to become primarily liable for the payment of the bonds issued by it, and nothing in the language of the charter in any respect affects this primary liability. The bonds, when issued, will create a debt of the city as fully as any other liability, for the payment of which the property of its inhabitants may be subject to taxation. By its charter the city is authorized and empowered to assess and collect taxes for general municipal purposes, not to exceed one-half of one per cent. each year, upon all the property within its limits, and the fund thus raised may be used for the payment of interest or principal upon the bonds proposed to be issued, if the money collected from water rates should prove insufficient; for nothing is more important to the welfare of a municipality than a regular supply of good, wholesome water for its inhabitants, which can best be secured through the instrumentality of well-equipped water-works, and hence the construction and operation of such works is held to be a general municipal purpose: *Smith v. City of Nashville*, 88 Tenn. 464, 12 S. W. 924; *Metcalf v. City of Seattle* (Wash.), 25 Pac. 1010. It seems to us, therefore, that the contemplated purchase of the water-works and the issue of bonds by the city of Corvallis involved the possibility, if not the probability, of providing for their payment by taxation, and therefore plaintiffs are interested in, and have a right to maintain, this suit. The case of *U. S. v. County of Macon*, 99 U. S. 582, relied upon by the appellant, is not in point, for in that case, by the Act authorizing the debt, and the general statutes in force at the time, the power of taxation for its payment was, in the opinion of the court, limited to

the special tax designated in the Act and such other taxes applicable to the subject as then were or might thereafter by general or special Acts be permitted, and hence the court refused to compel the county by mandamus to levy a tax for the payment of such bonds beyond the amount so authorized.

Having concluded that the plaintiffs are proper parties, we now pass to the question whether, under the admitted facts, the plaintiffs are entitled to the relief prayed for. The object of this suit is to prevent the purchase by the city of the plant of the Corvallis Water Company, and, as one reason therefor, the complaint alleges, and the demurrer admits, that such plant is not worth to exceed the sum of \$10,000, is inadequate in capacity, faulty in construction, and wholly insufficient in every respect to supply the city and its inhabitants with water, and that to pay \$28,000 therefor, as contemplated by the city, will be an unreasonable and flagrant waste of \$18,000 of the city's resources, and a great damage to the city, to these plaintiffs, and other taxpayers. The defendants having seen fit to rest their case upon the facts as stated in the complaint, the only question is whether, under these facts, the plaintiffs are entitled to have the contemplated purchase of the water-works perpetually enjoined. If so, the complaint states a cause of suit, and the decree must be affirmed, whether the objections to the validity of the various proceedings of the council looking to the sale of bonds by the city are well taken or not.

The contention for defendant is that the erection or purchase of water-works is by the charter left entirely to the discretion of the council, and that the courts have no jurisdiction or authority to interfere with such discretion. No principle of equity jurisprudence is, perhaps, better established than that when the officers of a municipal corporation are clothed with a discretionary power, and are acting within the scope of such power, a court of equity will not

sit in review of their proceedings, or interfere by injunction, at the suit of a private citizen, unless fraud is shown, or the power of discretion is being manifestly abused, to the oppression of the citizen. The fact that the court would have exercised the discretion in a different manner will not warrant it in interfering: 2 High, Inj., § 1240; *Spring Valley Water-works v. City of San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046. Now, in this case, the matter of erecting or purchasing water-works is by the charter of Corvallis committed to the judgment and discretion of the council, and, whether they act wisely or unwisely in so doing, it is not the province of a court of equity to interfere, so long as they exercise such judgment or discretion in good faith; but the gist of the complaint upon this subject is that they have not exercised their judgment and discretion in such manner, but arbitrarily, and without regard to the rights of the city or its taxpayers, have agreed and are about to pay \$28,000 for a plant worth but little more than one-third that amount, and wholly inadequate and insufficient for the purpose for which it is intended. Regarding this as true (being admitted by the demurrer), it evidently amounts to a legal fraud, and is such a manifest and gross abuse of power as will be prevented by an injunction at the instance of a taxpayer. Although the acts of the council are not charged to have been fraudulent, and the term fraud is not used in the complaint, facts are stated and alleged which show such a gross and manifest abuse of discretion and disregard for the rights of the taxpayer as amount to the same thing. Fraud is not a fact, but a conclusion of law from facts; and the term may not be used at all in the pleadings if facts are averred which show fraud as a conclusion of law: *Bliss*, Code Pl., § 211; *Hess v. Young*, 59 Ind. 379. The officers of a municipality in many respects sustain the relation of trustees to the citizens and taxpayers, and, while they are necessarily invested with large discretionary powers in the conduct of the affairs of the corporation, with which the

courts will not interfere, it is too clear for argument that they cannot, in total disregard of the rights of the citizens and taxpayers, waste and misapply the public funds, as the complaint alleges is contemplated in this case. By their demurrer the defendants admit that they intend and contemplate, as the representatives and trustees of the city, to pay \$28,000 out of the public funds for property worth not exceeding \$10,000, and wholly inadequate and insufficient for the purposes for which it is designed, and this admission shows such an unwarranted invasion of the rights of the taxpayer as will be prevented by an injunction at the instance of such taxpayer. This being so, the complaint states a cause of suit, and the demurrer was properly overruled, whether the objection to the validity of the bonds is sound or not, and we do not, therefore, deem it necessary to consider such objection at this time. For the reasons stated, the decree of the court below is affirmed.

A taxpayer may maintain a bill to prevent the waste of the funds of the municipality or injury to its property: *Mauldin v. Greenville*, 33 S. C. 1; *McCord v. Pike*, 121 Ill. 288; *Chicago v. Building Ass'n*, 102 Ill. 379; *Mathis v. Cameron*, 62 Mo. 504; *Pittsburg's Appeal*, 79 Pa. 317; *Wagner v. Mertz*, 69 Mo. 150; *Springfield v. Edwards*, 84 Ill. 626; *C. & V. R. R. Co. v. People*, 92 Ib. 170; *Waiston v. T. & P. R. R. Co.*, 1 Baxt. 60; *Dent v. Cook*, 45 Ga. 323, *Beach*, Mod. Eq. Juris., § 679; *Solomon v. Fleming*, 51 N. W. 304; *Mayor v. Gill*, 31 Md. 375. This is the rule in New York by statute, and a refusal to entertain a bid for a franchise and granting the said franchise without providing that the municipality shall be paid therefor is waste: *Adamson v. Union R. Co.*, 74 Hun, 3. A taxpayer's bill will lie to prevent the payment of claims which the auditing officers have no right to allow: *Beebe v. Sullivan County*, 64 Hun, 377; *West v. Utica*, 71 Ib. 540; to prevent this issue of unauthorized bonds: *Winamac v. Huddleston* 132 Ind. 217; or an illegal levy of taxes: *Moore v. Sugg*, 112 N. Car. 233; *Athens v. Hemrich* (Ga.), 16 S. E. 72; to restrain the execution of an un-

authorized contract: *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645; the appropriation of funds under an unconstitutional statute: *McCullough v. Brown* (S. Car.), 19 S. E. 458; the illegal disposition of public property: *Downing v. Ross*, 1 App. D. C. 251; payment to an unqualified officer: *Stearns v. Tews*, 6 Misc. (N.Y.), 404; the issue of warrants for an illegal or unauthorized purpose: *Ackerman v. Thummel* (Neb.), 58 N. W. 738; to restrain a municipality from exceeding the limit of indebtedness prescribed for it by the constitution: *Spilman v. Parkersburg*, 35 W. Va. 605; *Worthington v. Pierce* (Oreg.), 30 Pac. 450; *Anderson v. Orient F. Ins. Co.* (Iowa), 55 N. W. 348.

The mere interest that a taxpayer has, as such, even if small, is enough to sustain his bill: *Brockman v. City of Creston*, 79 Iowa, 587; but that his interest may be affected by the action which he seeks to have enjoined must appear: *Sherman v. Bellows*, 24 Oreg. 553; *Graves v. Jasper Township* (S. D.), 50 N. W. 904; and the alleged interest cannot be made a means of enforcing rights which should be enforced otherwise; thus the taxpayer cannot set up that the proposed action of the municipality will necessitate the violation of a contract existing between the city and that person: *Moore v. Walla Walla*, 60 Fed. Rep. 961; *Schwier v. Zetike*, 136 Ind. 210. To justify the interference of the taxpayer the injury threatened must be imminent: *Pedrick v. City of Ripon*, 73 Wisc. 622; *Searle v. Abraham*, 73 Iowa, 507; he must not be guilty of laches; if he stand by and allow an illegal contract to be consummated and the municipality to receive the benefit of it, he will be too late to file his bill: *Calhoun v. Millard*, 121 N. Y. 69; *Ford v. Cartersville*, 84 Ga. 213; *Chamberlain v. Lyndeborough*, 64 N. H. 563; *Parsons v. Northampton*, 154 Mass. 410.

To sustain a taxpayer's bill it is not in all cases necessary that the injury threatened should be irreparable. See *Beach Md. Eq. Juris.*, § 681; *Cobb v. J. & St. L. R. Co.*, 68 Ill. 233; *Bolton v. McShane*, 67 Iowa, 207; *Western Md. R. R. Co. v. Owings*, 15 Md. 199; *Frederick v. Grothon*, 30 Ib. 436; *Penna. R. R. Co.'s Appeal*, 115 Pa. 514; *Com'th v. Railroad Co.*, 24 Ib. 159; but where another remedy is provided it seems, it must be exhausted before equity is resorted to: *Nance v. Johnson* (Tex.), 19 S. W. 559. The taxpayer cannot by a bill interfere with a dis-

creation vested in a political body or with matters political: *Pierce v. Smith*, 29 Pac. 565; as the formation of a county: *Hughes v. Dobbs* (Tex.), 19 S. W. 684; the erection of a poor-house: *Lee v. Pendleton County Court* (Ky.), 10 S. W. 740; the removal of a county-seat: *Parmerter v. Bourne*, 8 Wash. 45. A taxpayer's bill cannot be used simply to determine title to an office and so usurp the functions of a *quo warranto*: *Johnston v. Garside*, 65 Hun, 208; but in *O'Brien v. Moss* (Ind.), 30 N. E. 894, it was held that a taxpayer might have an injunction directed to an illegally appointed school teacher forbidding him to act.

Injunction against trespass—When it lies.

WORTHINGTON v. MOON ET AL.

(Court of Chancery of New Jersey, October 6, 1894.)

Equity will not interfere to prevent a trespass where the legal rights of the parties have not been settled, or where it does not appear that the injury to the inheritance will be irreparable, or that the defendant is insolvent, but will leave them to their remedy at law.

Equity will not actively aid in the enforcement of a penalty or a forfeiture.

Bill by Albanus L. Worthington against Sarah R. Moon and others, for an injunction to restrain defendants from removing clay from complainant's land. Dismissal of bill advised.

E. R. Walker and *G. D. W. Vroom*, for complainant.

Barton & Dawes, for defendants.

BIRD, V. C.—On the 20th day of April, 1893, the defendants in this case conveyed to the complainant about twenty-six acres of land. In the deed was the following stipulation: "The said premises are also conveyed with the understanding that the said party of the first part may remain in possession of them until the first day of April,

eighteen hundred and ninety-four, and during that time may dig clay thereon as they have been doing, and in the same field, and may remove the same for their own use, without charge therefor; and also that the said party of the first part may remove all unused posts and a certain child's swing from said premises on or before April first, eighteen hundred and ninety-four." The defendants remained in possession under this stipulation until the 1st day of April, 1894. During that period of time they excavated 500 or 600 tons of clay referred to, but did not remove it from the premises. The defendants claim that it was not removed because of an express suggestion to that effect from the complainant, because of the very unfavorable condition of the market. Within a short time after the defendants vacated the premises they commenced carting the clay therefrom. To restrain this action upon the part of the defendants the complainant filed his bill and asked for a perpetual injunction. The complainant insists that the right to dig and to remove clay was limited to the 1st day of April, 1894, and that all of the clay which had been mined and cast upon the bank was forfeited to the complainant. By the answer it is urged that every right to which the complainant is entitled he can maintain by an action at law. The only answer to this was that the removal of the clay was a destruction of the inheritance, and irreparable in its nature. I apprehend this would be so had not the clay been excavated and severed. In this respect it must be regarded as trees severed, or stones from the quarry. Evidently this clay is personal property. The claim, therefore, that the removal of it is an irreparable injury to the inheritance is unavailing. Without this ingredient this court is powerless to act. This doctrine, I think, has never been disputed when the question has been raised. It was so decided in *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865, in the Court of Errors and Appeals, although, as I understand, the discussion was not opened upon the argument in that

court, as it certainly was not alluded to in the slightest degree in the court below: *Cornelius v. Post*, 9 N. J. Eq. 199; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *High, Inj.*, § 673; *Fulton v. Greacen*, 36 N. J. Eq. 210; *Kerr Inj.* 289. The principle upon which these cases stand is that the action complained of is nothing more than a naked trespass, involving no equitable considerations whatsoever, and fit subjects for the determination of a jury. This seems to have been equally well settled, as a reference to the above-cited cases will show. See, also, *Kerlin v. West*, 4 N. J. Eq. 449; *West v. Walker*, 3 N. J. Eq. 279. This case shows that the rule respecting the interference of equity is less rigid than it was anciently: *Quackenbush v. Van Ripper*, *ib.* 350; 1 High Inj. 699; *Stevens v. Beekman*, 1 Johns. Ch. 318. Equitable considerations often appear which justify the interference of a court of equity in behalf of the party who complains of the trespass. Prominent among these is the insolvency of the defendant trespasser: *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097, and cases cited; *West v. Walker*, *supra*, 282; 1 High Inj. 671, 674. But in this case there is not only no allegation of the insolvency of the defendant, but no proof whatever has been offered; hence the complainant is without relief in equity. And, in addition to this objection, the claim which he sets up amounts to a penalty or forfeiture, which courts of equity always refuse to enforce, except when the conditions are very plainly against the defendants. Mr. Bispham says: "It is well settled that a court of equity will not lend its aid actively to enforce a forfeiture." Section 181. In 2 Lead. Cas. Eq. 2048, the doctrine is thus stated: "All the authorities concur that when the case is such that a court of equity would not set aside a forfeiture, it would not intervene to enforce it, and will leave the parties to their legal rights and remedies." President, etc., of *Atlas Bank v. President, etc., of Nahant Bank*,

3 Metc. (Mass.) 582, 583; *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Baxter v. Lansing*, 7 Paige, 350. In Meigs's Appeal, 62 Pa. St. 28, on page 35, this principle is clearly presented. In this case an effort was made by the authorities of the town of York to obtain the judgment of the court against the United States, restraining them from removing certain buildings which had been erected during the war. The court said: "It is not the province of a court of equity to enforce penalties or forfeitures:" 1 Pom. Eq. Jur., § 459. In this case the defendants expended their labor in excavating 400 or 500 tons of clay, which, according to the complainant's bill and the testimony, are worth from \$300 to \$400. According to the complainant's insistent this has all been forfeited; so much of the consideration which he was to give and which the defendants were entitled to, he claims the right to retain. There seem, therefore, to be two well-settled principles governing courts of equity which stand in the way of the complainants obtaining relief in this court, namely, the fact that the trespass complained of does not work irreparable injury to the inheritance, and that a penalty or forfeiture would be the result of a decree in his favor, which courts of equity are always disinclined to pronounce. I will advise that the bill be dismissed, with costs.

The jurisdiction in equity to restrain trespass by injunction is of comparatively modern origin. The first relaxation of the rule, which confined such relief to cases of waste, basing the jurisdiction upon the privity of title of the parties (see *Mogg v. Mogg*, Dick. 670; *Davenport v. Davenport*, 7 Hare, 217; *Lowndes v. Bettle*, 33 L. J. Ch. 451), was by Lord THURLOW in *Flamang's Case*, cited 6 Ves. 147; see Kerr on Inj. 109. The present law may be stated as follows, while equity will not interfere to prevent a mere ordinary naked trespass: *Garston v. Asplin*, 1 Madd. 152; *Jackson v. Stanhope*, 15 L. J. Ch. 446; *Cooper v. Crabtree*, L. R. 20 Ch. D. 592; *Stevens v. Beekman*, 1 John. Ch. 318; *Jerome v. Ross*, 7 Ib. 315; *Minnig's Appeal*, 82 Pa. 273; *Goodell v. Lassen*, 69 Ill. 145; *Nicodemus v. Nicodemus*, 41 Md. 529;

Seymour v. Morgan, 45 Ga. 90; *Thorn v. Sweeney*, 12 Nev. 251; *Spofforth v. R. R. Co.*, 66 Me. 51; *Jordan v. Lanier*, 73 N. C. 90; *Horner v. Hall*, 17 Oreg. 165; it will grant an injunction in such special cases where there is no adequate remedy at law, where irreparable injury would be worked to the inheritance were equitable interference to be refused.

Equity will prevent by injunction a trespass to the realty when the damage would be irreparable and the title to the land is undisputed: *Lowndes v. Bettie*, *supra*; *Mitchell v. Dors*, 6 Ves. 147; *Courthope v. Maplesden*, 10 Ib. 289; *Cowper v. Baker*, 17 Ib. 128; *Dudley v. Hurst*, 67 Md. 44; *Gilbert v. Arnold*, 30 Ib. 29; *Preston v. Preston*, 85 Ky. 16; *Carney v. Hadley*, 32 Fla. 344; under this head we have cases in which injunctions have been issued to prevent the defacing of landmarks and making new ones: *Preston v. Preston*, *supra*; *Hillman v. Harley*, 82 Ky. 16; the use of water by a superior owner in such manner as to do mischief to the mills of a lower owner: *Robinson v. Lord Byron*, 1 Brown C. C. 588; the cutting of trees: *Courthope v. Maplesden*, *supra*; *Kinder v. Jones*, 17 Ves. 110; *Sailes v. Sailes*, 3 Sand. Ch. 601; but in this country some cases have added the condition that the timber must be the principal or at least a very material part of the value of the land: *Beach Mod. Eq. Juris.*, § 720; *Butnam v. James*, 34 Minn. 547; *Fulton v. Harmon*, 44 Md. 381; *Gause v. Perkins*, 3 Jones Eq. 177; *Thatcher v. Humble*, 67 Ind. 444; *Smith v. Rock*, 59 Vt. 232; *Griffith v. Hilliard*, 64 Ib. 643; *Northern P. R. R. v. Hussey*, 61 Fed. Rep. 231; *Carney v. Hadley*, *supra*; *Cypress Lumber Co. v. James*, 50 Fed. Rep. 360; *Wadsworth v. Goree (Ala.)*, 10 So. 848; *Rossman v. Adams*, 51 N. W. 685; *Caldwell v. Ward*, 88 Mich. 378; accordingly it has been held that an injunction will not be issued to restrain a trespasser from removing timber from a limestone claim, although the removal of such lime will render the limestone operation unprofitable: *Haney v. Butte & M. Commercial Co.*, 10 Mont. 793; and a mere cutting of timber without more will not be enjoined: *Stevens v. Beekman*, *supra*; in some cases the destruction of timber may be enjoined, although the title to the land is in dispute: *Griffith v. Hilliard*, *supra*; *Arment v. Hensel*, 5 Wash. 152; *Wood v. Braxton*, 54 Fed. Rep. 1005; *Wadsworth v. Goree*, *supra*; *Santee River*

Cypress Timber Co. *v.* James, 50 Ib. 360; the opening of mines or quarries or the taking of mineral therefrom may be enjoined: Hammond *v.* Winchester, 82 Ala. 470; Mitchell *v.* Dors, 6 Ves. 147; Grey *v.* Duke of Northumberland, 13 Ib. 236; Thomas *v.* Oakley, 18 Ib. 181; St. Louis Min. & M. Co. *v.* Montana Min. Co., 58 Fed. Rep. 129; Jennings *v.* Beale, 158 Pa. 283; Preteca *v.* Maxwell Land Grant Co., 50 Fed. Rep. 674; so the diversion of natural gas: Indianapolis Natural Gas Co. *v.* Kibbey, 135 Ind. 357; the taking of argillaceous stones from under the sea where the soil belongs to the plaintiff: Cowper *v.* Baker, 17 Ves. 128; the diversion of a stream from a mill: Corning *v.* Troy I. & N. Factory, 40 N. Y. 191; or cutting off a water supply: Wright *v.* Moore, 38 Ala. 193; Wilcox *v.* Wheeler, 47 N. H. 488; Pettigrew *v.* Evansville, 25 Wis. 223; extending a wharf to low-water mark upon a neighboring frontage: Maine Wharf Proprietors *v.* Custom House Wharf Proprietors, 85 Me. 175.

In proper cases where repeated acts of trespass are done or threatened, equity may interfere although each act, if considered by itself, would not rise to the dignity of destructive or irreparable injury: Port of Mobile *v.* R. R. Co., 84 Ala. 115; Smith *v.* Gardner, 12 Oreg. 221; Ellis *v.* Wren, 84 Ky. 254; Pappenheim *v.* Metropolitan Elev. Ry. Co., 128 N. Y. 436; Galway *v.* same, Ib. 132; Wheelock *v.* Noonan, 108 Ib. 179; Shaffer *v.* Stull, 32 Neb. 94; Teneyck *v.* Sjoburg, 68 Iowa, 625; Murphy *v.* Lincoln, 63 Vt. 278; Beach Mod. Eq., § 721. Equity will sometimes interfere against trespassers on the ground of the prevention of multiplicity of actions: Elridge *v.* Hill, 2 John. Ch. 281; West *v.* Mayor of N. Y., 10 Page, 539; Livingston *v.* Livingston, 6 John. Ch. 497; McHenry *v.* Hazard, 45 N. Y. 580; Thompson *v.* Engle, 4 N. J. Eq. 271; Hughlett *v.* Harris, 1 Del. Ch. 349; Youngblood *v.* Sexton, 32 Mich. 406; Mayor *v.* Pilkington, 1 Atk. 282; Weale *v.* West Middlesex Water Works Co., 1 J. & W. 358; Whaley *v.* Dawson, 2 Sch. & Lef. 367. In Carney *v.* Headley, *supra*, it is held that, where there is an adequate remedy at law, before equity will interfere for the purpose of preventing a multiplicity of actions, there must be several persons controverting the same right and each standing on his own pretension of right; but this does not seem to be in accord with the general rule. See Wheelock *v.* Noonan, 108 N. Y. 179; Galway *v.* Met. E. Ry., *supra*; Payne *v.* K. & A. V.

R. R. Co., 46 Fed. Rep. 547; *Midland Ry. Co. v. Smith*, 113 Ind. 233.

The insolvency of the trespasser may often induce equitable interposition in cases in which it would be denied as against a solvent person: *Hillman v. Hurley*, 82 Ky. 626; *Thornton v. Roll*, 118 Ill. 350; *Sullivan v. Robb*, 86 Ala. 433; *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387; *Hanley v. Watterson* (W. Va.), 19 S. E. 536.

In *Russell v. Merchants' Bank*, 47 Minn. 286, the court held that an injunction to restrain the removal of clay, used for brick-making in the usual way, would not be granted at the suit of a mortgagee or grantee of the tenant in common of the land upon which the clay was; but in *Righter v. Hamilton*, 10 Pa. C. C. R. 260, an injunction against opening a new clay pit was granted at the suit of a mortgagee. This was, however, on the ground that the opening constituted waste.

Fraud—Right to rely on representation—Rescission—Estoppel.

HOLTRY v. FOLEY.

(Supreme Court of Nebraska, December 5, 1894.)

The plaintiff is not estopped by an averment in his petition, immaterial at that stage of the pleadings. Notwithstanding such immaterial averment, he may, in his reply, aver a different state of facts.

In an action to rescind a contract for the sale of stock in a corporation because of fraudulent representations inducing the contract, the representation proved was that a report of the secretary of the corporation showed that it was earning a profit of two per cent. per month. The report referred to did show what was represented, but the report was false, and the defendant knew that it was false. *Held*, that the defendant thereby adopted the report as his own statement, and was responsible to the same extent as if he had represented the profit to be in fact as it was shown by the report.

A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.

The fact that the plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of the defendant.

Appeal from the District Court, Lincoln county.

This was an action by Thaddeus J. Foley against W. M. Holtry for the rescission of a contract.

The facts of this case were as follows : In February, 1890, the defendant Holtry owned two hundred shares of stock in the North Platte Milling and Elevator Company. Foley was the owner of certain real estate in North Platte. On February 24, 1890, Holtry transferred the stock to Foley and received in exchange a conveyance of the real estate and \$1,500 in cash. The petition, which was filed in January, 1891, set out, in addition to the above, that the exchange was brought about by false representations on the part of the defendant (which appear in the opinion of the court *supra*) and that "as soon as plaintiff discovered that such representations were false, to wit, or on about the 30th day of April, 1890, and at several times since," he applied to defendant and tendered back the stock and requested a reconveyance of the real estate. The answer, after being amended, set up that between May 1 and October 1, 1890, the defendant had improved the real estate, expending thereon \$1,500, that plaintiff stood by and saw such improvements without making objection thereto; that on March 1, 1890, the plaintiff was elected a director of the elevator company and afterwards acted as director. The reply admitted the improvement, but alleged that they had been made before the plaintiff learned of the falsity of the representations alleged in the petition, and that the improvement did not exceed \$1,300, of which \$1,000 remained unpaid and a lien on the property. After hearing evidence the court, CHURCH, J., entered a decree that the defendant reconvey the real estate, giving judgment for \$1,000 for the plaintiff and ordering

the latter to retransfer the stock to the defendant. The defendant took this appeal, and after argument, the decree of the District Court was, on June 26, 1894, reversed, but on motion a rehearing was ordered, which was now had.

Grimes & Wilcox and *Neville & Williams*, for appellant.

E. J. Haines, *B. J. Hinman* and *T. Fulton Gantt*, for appellee.

IRVINE, C.—An opinion was filed in this case June 26, 1894: 59 N. W. 781. A short statement of the case will be found in that opinion. The judgment of the District Court was then reversed, upon the ground that the conduct of the plaintiff subsequent to a time when the petition admitted he learned of the fraud estopped him from rescinding the contract. A rehearing was allowed, and the court is now convinced that in the former opinion an error was committed as to the effect which should be given to the averment in the petition referred to. The language of this averment in the original petition is as follows: "As soon as plaintiff discovered that said representations were false, to wit, on or about the 30th of April, 1890, and at several times since, plaintiff applied to defendant, and tendered to him said two hundred shares of the capital stock aforesaid." In the amended petition, upon which the case was tried, the language is the same, except that in place of the word "discovered" the pleader uses the phrase "had reason to believe." Upon the rehearing there has been considerable argument addressed to the question as to whether these phrases are or are not equivalent. We do not, however, think this question material. In the former opinion it was held that there was no such delay in bringing the action as would of itself bar the plaintiff from relief, and relief was denied solely because, with admitted knowledge of the facts, the plaintiff had permitted the defendant to incur large expense in improving the property taken by him in exchange for the stock, and had continued to deal with the stock as

his own, and take part in the management of the corporation. This was a matter of defense, and was not a fact which the plaintiff was called upon to anticipate and negative in his petition. Therefore the averment in the petition that plaintiff had reason to believe that the representations were false on April 30, 1890, was not a necessary or even a material allegation in the petition. The time when plaintiff learned of the fraud only became material when the defendant by answer pleaded the facts constituting the estoppel. The defendant, by answer, pleaded the estoppel, and also pleaded that the plaintiff had full knowledge of the standing and condition of the company at the time of his purchase. The reply meets this by averring that plaintiff had no actual knowledge of the facts constituting his cause of action until after the improvements were made, and immediately prior to the commencement of the action. Unless, therefore, the immaterial averment in the petition estops the plaintiff from afterwards asserting a contrary state of facts, the time when he learned of the fraud was properly placed in issue, and left for determination upon the evidence.

In *Lee v. Rogers*, 1 Lev. 110, the plaintiff counted on a promise made May 1, 3 Car. I, for money lent. The defendant pleaded that the writ was first brought February 4, 14 Car. II, and that he did not promise within six years before said 4th of February. The plaintiff replied that defendant assumed within six years before said 4th of February. It was moved in arrest of judgment that it appeared by the declaration that the cause of action arose more than six years before action brought, and that the replication was a departure. But it was held that the statute of limitations must be pleaded, and that, therefore, the replication was no departure, because the pleading of time in the declaration was immaterial. In *Morgan v. Vaughan*, T. Raym. 456, the plaintiff unnecessarily alleged his age at a particular time, and the defendant urged this as an estoppel

from showing the fact. But it was held to constitute no estoppel, because plaintiff's infancy, and not his precise age, was the issue, and the averment was immaterial. In *Gledstane v. Hewitt*, 1 Tyrw. 445, the action was *detinue* for a promissory note, the declaration counting on a general bailment. The defendant pleaded a special bailment, and the replication confessed and avoided. It was held that this was no departure, because of the averment of the general bailment in the declaration was immaterial. The pleader can hardly be held to a stricter accountability under the code than at common law, and we have concluded that, whatever might be the effect of the averment in the amended petition, if offered as an admission, it was an averment not material in that stage of the pleadings, and that the plaintiff is not estopped thereby.

This conclusion leads to an examination of the whole case. The law governing the case is for the most part well settled, and the question presented is really not what principles of law control the case, but whether there was evidence to which the law of rescission is applicable. The elements necessary to sustain such an action have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) that plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured: *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628. To these requirements the courts formerly added another, to wit, that defendant must have known that the representations were false. A more accurate statement, in view of the later decisions, would be that the defendant must either know that the representations were false, or else they must be made without knowledge as positive statements of known fact. The rule, as thus formulated, practically charges the defendant with notice of the truth in all cases where he makes positive representations of existing facts.

We shall examine the evidence with reference to the foregoing propositions.

False representations, in order to make a case for relief, must generally be positive statements in regard to existing facts, and not mere expressions of opinions, or promises as to future occurrences. The representations charged in the petition were that the elevator company stock was owned by well-known, reliable business men of experience; that Mr. John Bratt was president of the company, and had invested in the stock \$2,500; that the corporation was solvent; that it had earned for the preceding six months two per cent. per month on its paid-up capital stock, and that all of forty per cent. of its capital stock was paid up. The evidence shows that the stock of the company was owned by the men who were represented to own it, and that John Bratt was president. These representations may therefore be dismissed from further consideration. The evidence also shows that Mr. Bratt did hold capital stock to the amount of \$2,500 par value, but that this was held under an agreement whereby Bratt had the option of retaining the stock or of turning it in to Holtry and another stockholder and receiving therefor his investment back, with ten per cent. interest—an option which he finally exercised. It appears, however, by Foley's own testimony that he had sufficient information as to the nature of this agreement to put him upon inquiry as to Bratt's investment, if he did not have complete knowledge of the fact. Nothing, therefore, can be counted on the falsity of this representation. As to the representation in regard to the amount of capital stock paid up, Mr. Foley testified positively that Holtry represented to him that the capital stock was \$75,000, and that forty per cent. had been paid in. But he stated upon cross-examination that before the trade was consummated he learned that only thirty-seven and a half per cent. of the stock which he was buying had been paid, and he also testified when on the stand in

rebuttal that he learned before the trade was made that all the stock had not been subscribed. Upon this point, therefore, the plaintiff can claim nothing. As to the representation in regard to the solvency of the corporation, there is no proof of any direct representation on the subject. It appears that a report of the secretary, prepared shortly before the trade was made, showed that the corporation was solvent; but Foley testifies that he did not see this report until after the trade was made, although statements had before been made to him in regard to a portion of its contents. If there was any representation as to the solvency, it must, therefore, be implied from the representations made as to the company's earnings, and we are thus limited in our further inquiry to the allegations in regard to those representations. The specific representation claimed to have been made on the subject was that for a period of six months preceding the transaction the company had been earning a profit of two per cent. a month on its capital stock. The evidence is not only ample to sustain the finding of the trial court upon this issue, but it is such that no other finding could be sustained. Mr. Foley several times, and in the most positive terms, testifies to this representation, and Mr. Holtry himself says: "According to the last statement, as I told Mr. Foley, since Mr. Allum had gotten it out, did show a gain of pretty nearly two per cent. per month. Of course, the books were not closed up, and we cannot tell exactly the amount." Mr. Holtry repeats in two other places that he made this statement to Mr. Foley. The statement appears to have been made with reference to the secretary's report, and it is inferable from all the evidence that Holtry was basing his statement upon the showing made by that report, and that Foley was so informed. The representation, then, was not in regard to the profit as an independent fact, but as to a profit as shown by the secretary's statement. The effect of this distinction it will be necessary to notice hereafter. Was this representation true? There is no

doubt that on January 10 a statement was prepared purporting to show the business from July 10, 1889, to January 10, 1890, and that it disclosed a profit during that period of about two per cent. a month. This report does not seem to have been presented to the directors until March 6 ; but it had been disclosed to individuals, and its contents were known to Holtry and others interested. A vigorous effort was made by the defendant to prove the substantial accuracy of this report. The question before us is not, however, whether there was evidence to sustain the report, but whether there was sufficient evidence impeaching it to sustain the finding of the trial judge. The evidence upon this subject was very voluminous, and we cannot refer to it in detail. An experienced bookkeeper testified in regard to an examination of the books and business. The effect of his testimony is that when the books are carefully examined, and certain corrections in the method of bookkeeping made, they disclose that there was no profit made during the period in question. The elevator company, besides its business at North Platte, its principal location, had agents at a number of other points, engaged in the business of buying and selling grain. In the accounts with these agents, the books, at the time the statements were made, failed in some instances to show proper credits, thus making the resources of the company appear greater than they were in fact. Some of these items are quite satisfactorily explained. It does not appear that in any case were the books fraudulently kept ; but it does seem from a review of the testimony that the method pursued left the books in such a condition that the statement on January 10 exhibited too large a proportion of resources. There is also evidence tending to show the omission from the books of several items of outstanding indebtedness, and we think there was ample to warrant the court in finding that such a method had been pursued as to relegate some losses to the preceding six months, and postpone others until the following six

months, both ~~processes~~ resulting in a fictitious showing of prosperity during the period in question.

The representation by Holtry having been as to what this statement showed, and not directly and positively as to what the profit actually had been, the next question which arises is whether, under the circumstances, he is responsible. If Holtry possessed and claimed to possess no knowledge except that derived from the statement, we would not hesitate to say that he could not be held responsible. In other words, if his representation amounted to this: that he did not know of his own knowledge the condition of the company, but that the secretary's report showed a certain profit, then, the report showing such profit, the falsity of the representation would not be established. But while it is clear that in his conversation with Foley he based his representation upon the showing made in the report, he coupled this statement with a distinct representation that the mill was a good, paying investment. It is probable that this would have to be taken as a statement of fact within his own knowledge, but it is not necessary to so decide. We think that if, as a matter of fact, Holtry knew that the report was false, and that the mill had not been earning a profit, then he cannot protect himself by falling back upon the contents of the report. If he knew the report was false and based his representation upon its contents, by so doing he adopted the report as his own representation, and must be held responsible for its falsity. Upon this subject the evidence is that Holtry was at the time, and had from the start been, general manager of the company, with his place of business in the mill, and therefore presumably had some familiarity with the business. There is also evidence tending to show that he made entries upon some of the books. He presumably had access to the books. These facts in themselves are only circumstances showing the opportunity of knowledge upon his part, but do not directly show his knowledge. Mr. Carter, who is a stockholder, testifies that after the report

was made known, and before the trade between Holtry and Foley, Carter went to Holtry and said: "Everything looks pretty well now. It seems as if everything was turning, and we are making money. I presume I can use—I suppose some call it 'dividend'—what the profit would be for my share for interest upon my notes. I says, 'They have been talking about it, and I would turn that over.'" To this he testifies that Holtry responded, "Mr. Carter, we are not making money." Carter then said: "Mr. Allum said so yesterday. In the meeting he reported it." Holtry then said: "We are not making anything. We are running behind all the time. We have to say something to satisfy them; something that will content them." He further testifies that Holtry added: "We have to do something else or they will shut us up." Carter said: "That is a queer way of making a report if we are not making anything." Holtry responded: "Well, we are not making anything, and the stiller we keep the better it will be." Severe comments are made in argument upon Carter's credibility, but this was a question for the trial judge, and he evidently believed his testimony. If we accept it we must conclude that Holtry knew that the report was false; that he knew the company had not earned any profit, and that when he referred to the report as showing a profit it was done with the deliberate intention of inducing Mr. Foley to believe a state of affairs very material to the value of the stock, and which Holtry knew did not exist. There is ample direct testimony by Foley that he believed the representations made to him. The defendant called several witnesses by whom he proved that shortly after the trade Foley stated to them that the mill had been earning two per cent. a month. While this testimony was introduced for another purpose it tends to show that Foley at the time did believe the representations to be true. Equally positive is Foley's testimony that he relied on this representation and acted upon it. It does appear that he made inquiry of others and that to a certain extent

he also relied upon their statements, but it is not necessary in such a case that the plaintiff should have relied entirely upon the representations made to him. It is sufficient if they formed a material inducement to the trade. That they did so in this case appears not only from Foley's testimony but is inferable from all the circumstances.

It is urged that Foley had no right to rely upon this statement, but that he should have made inquiry from other sources. We have little sympathy with the theory always advanced in such cases, that the defendant should be protected from the consequences of false statements made by him for the purpose of inducing the plaintiff to act, because the plaintiff had sufficient confidence in the defendant to believe the statement, and not proceed upon the assumption that he was dealing with a man unworthy of belief. There are some cases where the fact lies so open before the plaintiff that he is unwarranted in closing his eyes to its existence and depending upon a statement made to him by the other party. We do not think that this principle applies to any case where an absolute statement of fact is made, and where an investigation elsewhere would be necessary to disclose its falsity: 2 Pom. Eq. Jur. 891. In such case the plaintiff may, if he choose, rely upon the representation made to him, and if he do so the defendant cannot complain. It is true that Mr. Foley made inquiries of Mr. Patterson, another stockholder, before he made his trade, and that Mr. Patterson made a similar statement as to the secretary's report. Mr. Patterson was apparently deceived thereby also, and it all comes back to the falsity of this report. Its falsity being known by the defendant, the report was nevertheless used by him to induce the trade. That the representation operated to plaintiff's injury is too clear to require discussion. The plaintiff, therefore, was entitled to the relief awarded him by the decree of the District Court, unless he in fact knew of the falsity of the representations before the defendant made the improvements upon the property by

him received. On this issue the decree contains no direct finding. Our attention is called to certain testimony of the plaintiff, which it is claimed establishes the fact of such knowledge. In one place, on cross-examination, the plaintiff states, being examined as to the allegation as to knowledge on the 30th of April, that he had reason then to believe that the representations were false; but we think the clear preponderance of the evidence is that he was not in possession of actual knowledge of the fact until a much later time, that in fact when he first consulted an attorney his belief was not based on evidence sufficient then to justify legal proceedings. We do not think he was compelled to bring his action, or even to notify defendant of his election to rescind the moment his suspicions were aroused. It was sufficient if, after being put upon inquiry, he proceeded with reasonable promptness to ascertain the facts. Our attention is also called to a point in his testimony where he states that in February he learned from the statement that there had been a loss; but this testimony, when taken with its context, refers back to the testimony of Mr. Patterson, and from that it appears that the loss referred to, as shown by the statement, was a loss shown to have occurred prior to the period to which the representations related. There are other circumstances tending to show knowledge, or means of knowledge, prior to the defendant's making the improvements. The questions thus presented are wholly questions of fact, and we do not feel warranted in expanding this opinion by a review of the evidence on the subject. We think that when the evidence is taken together it shows that, while the plaintiff was in possession of information prior to the time of the making of the improvements sufficient to arouse his suspicions and sufficient even to impose upon him the duty of investigating and ascertaining the facts, he did not learn facts sufficient to demand of him action until after the improvements were completed, and that the delay in ascertaining the facts was satisfactorily ex-

plained, and cannot be attributed to plaintiff's negligence. Judgment affirmed.

Where a contract has been induced by a material representation of fact which is untrue it is no defense to an action for rescission that the party, to whom the representation was made, had the means of discovery and might with due diligence have discovered its untruth; for such party was not put upon inquiry and had a right to rely on the express statement of an existing fact, the truth of which was not known to him, but was known to the opposite party, as the basis of a mutual agreement: *Rawlins v. Wickham*, 3 De G. & J. 304; *Redgrave v. Hurd*, 20 Ch. D. 1; *Cottrill v. Krum*, 100 Mo. 397; *Mead v. Burns*, 32 N. Y. 275; *Ledbetter v. Davis*, 121 Ind. 119; *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40; *Tilton v. Tisdale*, 48 Vt. 83; *Kramer v. Williamson*, 135 Ind. 655; *Erickson v. Fisher* (Minn.), 53 N. W. 638; *Newton v. Terry* (Ky.), 22 S. W. 159; *Brockham v. Schilling*, 52 Mo. App. 73. There are some cases in which it is said that the neglect to make inquiry or examination, when the matter concerning which the representations are made is equally open to both parties, will preclude a rescission: *Farnsworth v. Duffren*, 142 U. S. 43; *Slaughter v. Gerson*, 80 Ib. 379; *Attwood v. Small*, 6 C. & F. 232; *Bell v. Byerson*, 11 Ind. 231. Mr. Pomeroy says that a party is not justified in relying upon statements made to him: "1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties:" 2 Pomeroy Eq. Jur., § 892. It is a little hard to reconcile the two lines of cases except, perhaps, by giving a very rigid interpretation to the words generalities and opportunities, but the doctrine first stated seems to be the one which is at present gaining ground, as will, it is thought, be seen by a consideration of the cases cited in this note. The doctrine approved by Mr. Pomeroy is

practically *caveat emptor*, which is that whenever the subject of a sale is equally open to the examination of both buyer and seller, then the former shall not be permitted to avoid his bargain upon the allegation that the sale was induced by false representations with regard to its subject by the seller: Story Eq. Juris., § 200 a.; Prince v. Overholzer, 25 Wis. 646; Brown v. Leach, 107 Mass. 364. The rule is generally applied to sales of chattels, but it is applicable to land: Board of Commissioners v. Younger, 29 Cal. 172; Bianconi v. Smith (Ariz.), 28 Pac. 880; and to mines, at least when they are open ones: Colby v. Gadsden, 34 Beav. 416. The rule does not apply when the representation is as to occult qualities: Fisher v. Worrall, 5 W. & S. 478; Moncrief v. Wilkinson, 93 Ala. 373; but the condition of a mill: Clark v. Everhart, 63 Pa. 347; of a steamboat: Slaughter v. Gerson, *supra*; the liability of land to overflow: Wright v. Gully, 28 Ind. 475; the weight and capacity of a machine: Gaty v. Holcomb, 44 Ark. 216, have been held not occult, and when an agent of a ship carpenter falsely represented to a vessel owner, in order to induce him to have the vessel repaired by the carpenter, that his shipyard contained certain appliances, it was held that the shipowner was not entitled to damages, when he was at the yard and could have noted the absence of the appliances: The Mattano, 10 U. S. App. 111. The cases to which the rule has been most frequently held not to apply, even when the rule is admitted to be in force, are horse sales. See Nelson v. Martin, 105 Pa. 229. The rule does not apply where artifice has been resorted to to prevent inquiry or conceal defects: Roseman v. Canevan, 43 Cal. 110. Some cases hold that where the vendor has made representations which induce the vendee to rely on them and on that account to abstain from inquiry the rule will not be applied: Oswald v. McGehee, 28 Miss. 340; Taymon v. Mitchell, 1 Md. Ch. 496; Roberts v. French, 153 Mass. 60; Lewis v. Jewett, 151 Ib. 343; Ledbetter v. Davis, *supra*; Cottrill v. Krum, *supra*; but see Long v. Warren, 68 N. Y. 426, where a majority of the court held that where there were fraudulent representations, but no artifice was employed to prevent inspection, the rule would apply. The limitation of the rule, involved in regarding an assertion as sufficient to bar its operation, if it, in fact, prevented inquiry, comes very close to holding

that the vendee has a right to rely on the assertion of the vendor and to be relieved if it is false.

In order to afford ground of relief, the misrepresentation must be one upon which the plaintiff relied and by which he was actually misled: *Hall v. Field*, 76 Va. 594; *Jennings v. Boughton*, 5 De G., M. & G. 26; *Zentmayer v. Miltowner*, 5 Pa. 403; *Vigers v. Pike*, 8 Cl. & F. 563; *Smith v. Chadwick*, L. R., 9 C. A. 187; *Farrar v. Churchill*, 135 U. S. 609; *Pratt v. Philbrook*, 33 Me. 17; *Glasscock v. Minor*, 11 Mo. 655; *Watts v. Cummins*, 59 Pa. 84; *Harris v. Tyson*, 24 Pa.; *Davis v. Hawkins*, 163 Ib. 746; *Lincoln v. Ragsdale* (Ind. App.), 37 N. E. 25. If, therefore, the vendee know the statement to be false, there can be no relief: *Nelson v. Stocker*, 4 De G. & J. 458; *Lilienthal v. Suffolk Brewing Co.*, 154 Mass. 185; but the mere fact that the vendee had suspicions that the story told him was not true or had heard random statements contradicting what was told him is not enough to bar relief: *Virginia Land Co. v. Haupt* (Va.), 19 S. E. 168; and see *Hamlin v. Abell*, 120 Mo. 188; equity will also hold that a man could not have been misled by what was evidently a mere guess or speculation though asserted as a fact: *Sawyer v. Prickett*, 13 Wall. 146; *Fulton v. Noble*, 83 Cal. 7; *Lockwood v. Fitts*, 90 Ala. 150; *Earl v. Worthington*, 88 Ala. 337; *Bradfield v. Elyton Land Co.* (Ala.), 8 So. 383; *Western Telegraph Co. v. Bush*, 35 Ill. App. 23, and if, during the pendency of negotiations, after a statement has been made which deceives one party, the falsehood becomes known, or if the person who made it makes another which ought to put the other party on inquiry, as where he says his first statement was an opinion only, relief will be refused: *Henry v. Great Northern R. W. Co.*, 1 De G. & J. 606, but a mere apparent conflict, not brought about by an assertion of the guilty party, will not have that effect, as when after being shown by a vendor a boundary on the land, the vendee, before completing the purchase, becomes possessed of a map showing a different boundary he will still have a right to rely on the vendor's assertion as to the boundary: *Castenholz v. Heller*, 82 Wisc. 30. When an examination of the subject of contract has been made by the vendee, he will be held to have bought on the faith of that and not of the representations: *Jennings v. Boughton*, 5 De G., M. & G.

126; *Clapham v. Shillito*, 7 Beav. 169; *Hall v. Thompson*, 1 Sm. & Mar. 463; *Denny v. Woods*, 2 Ind. App. 301; *Newton v. Long*, 13 Ky. L. R. 698; *Cooper v. Harvey*, 41 N. Y. S. R. 894; so it is held that relief will be denied where a full and free opportunity has been afforded for examination: *New Brunswick & Canada River and Land Co. v. Conybeare*, 9 H. L. 711; *Wade v. Ringo* (Mo.), 25 S. W. 901; so where full access has been given to the books of a business: *Poland v. Brownell*, 135 Mass. 138; *Farrar v. Churchill*, *supra* (mere reference to the authority for a statement is not, however, enough to exclude relief: *Campbell v. Hillman*, 15 B. Mon. 508). But where a party has been induced by the false representation to make a less thorough investigation than he otherwise would have made: *Mason v. Crosby*, 1 Wood & Min. 342; or the means tendered to assist examination are such that it would be impracticable or unreasonably difficult or unreasonably expensive to ascertain the truth, and there has been a positive statement as to a fact, relief will not be barred: *Redgrave v. Hurd*, *supra*, *Spalding v. Hedges*, 2 Pa. 240. A vendee may therefore rely upon the vendor's statement as to lands at a distance although sources of accurate information are open to him: *Spalding v. Hedges*, *supra*; *Becroft v. Grist*, 52 Mo. App. 586; *Henderson v. Henshall*, 54 Fed. Rep. 320, *aliter* when the lands are near: *Wallace v. Hussey*, 63 Pa. 24; *Lake v. Tyree* (Va.), 19 S. E. 787; *Armstrong v. White* (Ind. App.), 36 N. E. 847; but see *Wright v. Dennison*, 56 N. Y. S. R. 549; *Nichols v. Colgan*, 130 Ind. 341. In *Higgins v. Samuels*, 2 Johns. & Hem. 460, where the vendor had represented land as "first-class," a cursory examination was held not to be a bar to relief, by way of defense to a bill for specific performance, and in *Carpenter v. Wright*, 52 Kan. 221, a vendee was held entitled to rely on a "plat" received from the vendor, although he inspected the land and there was no artifice used to prevent full examination. See *Griffing v. Diller*, 50 N. Y. S. R. 435, and see as to effect of cursory examination, *Redgrave v. Hurd*, *supra*. As to title it is held that when there is a positive assertion of title the vendee or mortgagee is not even bound to examine the public records in order to verify the statement: *Carpenter v. Wright*, *supra*; *Baker v. Maxwell* (Ala.), 14 So. 468; *Backer v. Pyne*, 130 Ind.

288; *Daly v. Bernstein* (N. M.), 28 Pac. 764; see *contra* *Bianconi v. Smith*, *supra*.

In some cases in which the statement is held ground of relief, the person making the statement has, personally, means of knowledge superior to those of the person to whom the statement is made, and it is held that a statement from such a source may be reasonably relied on; thus when the person making the assertion is an officer of a company his statement, made in the course of a contract as to the business or condition of the company, may be relied on by the persons to whom they are made: *Leicester Piano Co. v. Front Royal and R. Imp. Co.*, 55 Fed. Rep. 190; *Merrill v. Florida Land Co.*, 8 C. C. A. 444; *Yeomans v. Bell*, 79 Hun, 215; *Rothmuller v. Stein*, 60 N. Y. S. R. 646; the buyer of stock has a right to rely on the statement of the seller as to its value, profits of the company, etc.: *Dakota National Bank v. Taylor* (S. D.), 58 N. W. 297; *Redding v. Wright* (Minn.), 57 N. W. 1056; and a purchaser of bonds, who has no means of readily ascertaining their value but trusts to the statements of the vendor, will be relieved if he is misled: (R. I.) *Handy v. Waldron*, 29 Atl. 143.

A misrepresentation in a prospectus of a corporation on the faith of which persons have purchased shares, is ground for relief: *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Smith's Case*, L. R. 2 C. A. 604; *affd. sub nom. Reese River Silver Mfg. Co. v. Smith*, L. R. 4 H. C. 64; *Pulsford v. Richards*, 17 Beav. 87; *Scott v. Petroleum Co.*, L. R. 23 Ch. D. 413; *Coles v. Kennedy*, 46 N. W. 1088, and see *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. 69.

In order to be a ground of relief the fraudulent misrepresentation need not be the *sole* inducement to the contract; it is sufficient that it has been a material inducement: *Sioux Nat. Bank v. Norfolk State Bank*, 56 Fed. Rep. 139; *Kley v. Healy*, 127 N. Y. 555.

Fraud—Remedy at law.

OTTENBURG ET AL. v. BARNES ET AL.

(Supreme Court of Utah, June 19, 1894.)

In an action against a firm by judgment creditors to set aside, as fraudulent, an assignment for the benefit of creditors and for the appointment of a receiver, the complaint alleged that plaintiff's executions had been returned unsatisfied, that the assignment contained an illegal preference, that, unless prevented by the court, the assignee would turn over the property to the preferred creditors, that the assignee was insolvent. *Held*, that the complaint was not demurrable on the ground that plaintiffs had an adequate remedy at law.

Appeal from District Court, Weber county, JAMES A. MINER, J.

Action by Simon Ottenburg and others against Charles C. Barnes and others. The facts appear in the opinion of the court. From a judgment sustaining a demurrer to the complaint, plaintiff appealed.

A. R. Heywood, J. H. McMillan and W. L. Maginnis, for appellants.

Kimball & Gilbert and E. M. Allison, Jr., for respondents.

SMITH, J.—This was an action in the nature of a bill in equity to set aside a fraudulent assignment for the benefit of creditors, for the appointment of a receiver of the assigned estate, and for general relief. A demurrer was interposed on the ground that the bill did not state sufficient facts to constitute a cause of action. The demurrer was sustained. Plaintiffs declining to amend, judgment was entered for defendants, from which plaintiffs appeal. The complaint states substantially that plaintiffs are judgment creditors of Matson, Barnes & Co.; that they have had executions issued and returned unsatisfied, and that their judgments are unsatisfied; that the firm of Matson, Barnes & Co., up to Jan-

uary, 1893, was a partnership consisting of defendants, E. W. Matson, C. C. Barnes and George H. Matson; that in January, 1893, the firm was insolvent, and has so continued ever since; that in January, 1893, by a secret arrangement between themselves, E. W. Matson and C. C. Barnes, who were respectively brother and half-brother of George H. Matson, pretended to buy out the interest of George H. Matson for \$6,000, and in July, 1893, the firm made an assignment to defendant, T. P. Bryan, for the benefit of creditors, and in such assignment preferred George H. Matson for the \$6,000 purchase-money above mentioned. It is further alleged that Bryan has \$5,000 worth of property in his hands and that he threatens to and will pay the same over to George H. Matson as a preferred creditor, unless prevented by the court. It is also alleged that Bryan is not a fit person for assignee or trustee; that he is a partner with all of the defendants in certain other enterprises; that he is insolvent; that he has secretly, and to evade process, disposed of a large portion of the assigned property; and that he has no experience that would fit him for handling the assigned property. The suit is brought on behalf of all creditors who will join (and several have joined), and the prayer is for a receiver for the assigned estate (which consists of merchandise), and for a cancellation of the deed of assignment, and for general relief.

The demurrer confessed all the facts alleged to be true. And counsel for respondent here admits that the assignment is void as to the creditors, and also admits that Bryan is about to dispose of the trust funds in payment of the fraudulent claim of George H. Matson, pursuant to the provisions of the deed of assignment; but he claims that plaintiffs, by their own showing, have an adequate remedy at law, and therefore the complaint discloses no ground for equitable relief. Let us examine this claim. Cases arising from the fraudulent conduct of a party are usually cases in which courts of law and equity have concurrent jurisdiction. See

Pom. Eq. Jur., §§ 139, 140, 174. At § 175 of Pomeroy's Equity Jurisprudence, the author points out in a masterly way the true distinction between law and equity jurisdictions. Without using his language the difference is this: Whenever the relief sought in the action is the recovery of specific lands or specific chattels or a specific sum of money, or one or more of these without other relief, then the case is one cognizable only at law; but if the case is one where in order to reach either of these final results it is necessary to procure a cancellation of some writing, or the taking of an account, or some other act of adjudication which goes beyond a simple verdict in favor of one or the other party, then the case is one in which the courts of equity also will assume jurisdiction. An action solely for the cancellation of an instrument is exclusively equitable. See *Ib.* 171. An action at law may involve the same result indirectly. In the latter case the courts of law and of equity have concurrent jurisdiction. For a perfect elucidation of this rule, see *Ib.* 110. In the case at bar the ultimate relief sought is unquestionably the recovery of a portion of the assigned insolvent estate, and yet, in order to obtain this, they must have the deed of assignment canceled, must have an accounting with the assignee and a distribution of the money among the parties joining in the suit. As stated by Pomeroy (§ 175, *supra*): "The money is to be regarded as a fund which is to be either awarded to a single claimant or distributed among several claimants in the shares to which they are adjudged to be entitled." In such a case as the one at bar no doubt the plaintiffs might obtain relief at law if they could persuade an officer to levy their executions on the property in the possession of Bryan, in utter disregard of the claims of Bryan; but it would seem to be a sufficient answer to all this to say that they have exhausted the final legal process, to wit, an execution, and have failed to obtain any relief. Then, again, it is manifest that by such a levy as that just suggested, the officers and

plaintiffs both lay themselves liable to a suit by Bryan for conversion. Can it be said that the remedy which exposes a party to vexatious litigation is an adequate remedy? We think the law has wisely provided a remedy by which the fraudulent claims of Bryan in this case may be set at rest, and the right of plaintiffs to a distribution of the trust fund be declared without the risk of further expense or litigation. That is just what plaintiffs have asked in this complaint. If the facts alleged are true, they are entitled to this relief. Among other authorities sustaining this conclusion are: *Wait*, Fraud. Conv., § 51; *Bump*, Fraud. Conv., p. 530; *Stevenson v. Matteson* (Mont.), 32 Pac. 291; *Smith v. Sipperly* (Utah), 34 Pac. 54. The judgment of the court below is reversed and the cause is remanded, with directions to the court below to overrule the demurrer and to hear the case; appellants to recover of respondents the costs of this appeal.

MERRITT, C. J., and BARTCH, J., concur.

According to Mr. Justice STORY, equity has concurrent jurisdiction with the courts of law in "all cases of legal rights where under the circumstances there is not a plain, adequate and complete remedy at law:" *Story Eq. Jurisp.*, § 76. With regard to fraud, equity undoubtedly has jurisdiction to relieve against every species of fraud, whether a legal remedy exists or not: *Chesterfield v. Jannsen*, 2 Ves. Sr. 125; *Slim v. Croucher*, 1 De G., F. & J. 518; *Hill v. Lane*, C. R. 11 Eq. 215; *St. Aubyn v. Smart*, *Ib.* 5 Eq. 183; *Colt v. Woolaston*, 2 P. Wms. 154; *Ramshrie v. Bolton*, L. R. 8 Eq. 294; *Evans v. Bicknell*, 6 Ves. 182; *Bacon v. Bronson*, 7 John. Ch. 201; *Warren v. Holbrook*, 95 Mich. 185; *Beach*, *Mod. Eq.*, § 65; *Patton v. Glatz*, 65 Fed. Rep. 267; *Sweetser v. Silber* (Wisc.), 58 N. W. 239.

There is to this rule of jurisdiction one well-recognized exception. Equity has no jurisdiction in cases of fraud in the obtaining of a will and cannot set aside the will or its probate: *Bispham Eq.*, § 199; *Story Eq. Juris.*, § 184; *Beach*, *Mod. Eq.*, § 66; *Ker-*

rich *v.* Brandy, 7 Bro. P. C. 437; Bennett *v.* Vade, 2 Atk. 234; Allen *v.* McPherson, 1 H. L. Cas. 191; Jones *v.* Gregory, 2 De G., J. & S. 87; Jones *v.* Jones, 3 Meriv. 171; Gingell *v.* Horne, 9 Sim. 539; Gaines *v.* Chew, 2 How. 645; Broderick's Will, 21 Wall. 503; Simmons *v.* Saul, 138 U. S. 439; Adams *v.* Adams, 22 Vt. 50; Colton *v.* Ross, 2 Paige Ch. 396; Chipman *v.* Montgomery, 63 N. Y. 221; Bailey *v.* Briggs, 56 Ib. 407; Hamberton *v.* Terry, 7 How. (Miss.) 143; Ewell *v.* Tidwell, 20 Ark. 136; Blue *v.* Patterson, 1 Dev. & B. 90; McDowell *v.* Peyton, 2 Desau. 313; State *v.* McGlynn, 20 Cal. 233; Brady *v.* McCosker, Ib. 214; Burrow *v.* Ragland, 6 Humph. 481. There are, however, some early cases in which the law was held otherwise: Maundy *v.* Maundy, 1 Ch. R. 661; Goss *v.* Tracy, 1 P. Wms. 287; Welby *v.* Thomagh, Pr. Ch. 123, and in McDowell *v.* Peyton, 2 Desau. 313, the court made a decree that the respondent should consent to a revocation of the probate of a will. These cases are no longer of authority. When, however, a particular devise or bequest has been obtained by promises that it will be used for the benefit of another person, equity will interfere with the consummation of a fraud, by treating the fraudulent devisee or legatee as a trustee for the person whom the testator intended to benefit: Seagrave *v.* Kirwan, 1 Beat. 157; Kennell *v.* Abbott, 4 Ves. 802; Hoge *v.* Hoge, 1 Watts, 213.

While the above statement as to the concurrent jurisdiction of equity in cases of fraud is unquestionable in theory, yet, in practice, a court of equity will not entertain a case in which there exists a full, adequate and complete remedy at law, and no peculiar equitable remedy is required, ancillary to that given by law in order to render the latter efficacious or to enable it to be brought into play: Newham *v.* May, 13 Price, 49; Russell *v.* Clark, 7 Cranch, 69; Bisph. Eq., § 200.

Mortgage—Fraud—Signing without reading.MEDLIN *v.* BUFORD ET AL.

(Supreme Court of North Carolina, November 27, 1894.)

Where a person who has a good education executes a mortgage without reading it, or requesting that it be read, supposing that it is a "lien" of some kind different from a mortgage, and is induced to execute it by the false representation of a third person that it is not a mortgage, and that they "could do away with it in thirty days," the mortgage is not void in the hands of an innocent purchaser.

Appeal from Superior Court, New Hanover county.

Action by J. T. Medlin against Mary Buford and others to foreclose a mortgage. Judgment for defendants. Plaintiff took this appeal.

J. D. Bellamy, Jr., for appellant.

T. W. Strange, for appellees.

SHEPHERD, C. J.—The first question to be considered is whether the mortgage executed by the defendants to the plaintiff is absolutely void by reason of fraud in the *factum*. If such be the case, it would be immaterial whether the plaintiff is an innocent party, since, the deed being a nullity, no rights could be asserted under it in favor of any person whomsoever. It is this very serious consequence which influences the courts to adhere strictly to the old and well-settled principle applicable to cases of this character, and, tested by these, we have but little difficulty in reaching the conclusion that the fraud in the present instance was in the representation or treaty, and not in the *factum*. A deed made by reason of this species of fraud is often said to be void, but it will be found upon examination that this term is indiscriminately used in connection with any deed that may be avoided either at law or in equity. But, as is said in *Somes v. Brewer*, 2 Pick. 191, the distinction between void and

voidable deeds becomes highly important in its consequences to third persons, "because nothing can be founded upon a deed that is absolutely void, whereas from those which are only voidable fair titles may flow." The distinction is clearly drawn in *McArthur v. Johnson*, Phil. (N. C.) 317. In that case a person proposed to convey a tract of land in trust, and his brother undertook to have the deed drawn, but, without the knowledge of the vendor, inserted therein a conveyance also of another tract in trust for himself, and upon presenting the deed for execution, in reply to a question by the vendor, said that it was "all right," whereupon the latter executed it without reading it or hearing it read. It was held that the conveyance was valid at law, there being no fraud in the *factum*. The court, after giving the surreptitious substitution of one deed for another, and the false reading of a deed upon request to a blind or illiterate person, as examples of fraud in the *factum*, then proceeds to speak of what is meant by fraud in the representation or treaty. "In all of the cases it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it." The opinion quotes with approval the following language from 1 Shep. Touch. 56: "If the party that is to seal the deed can read himself, and doth not, or, being an illiterate or a blind man, doth not require to hear the deed read or the contents thereof declared, in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but equity may correct mistakes, frauds," etc. In 3 Washb. Real Prop. 252, it is said: "But, if the party can read, it is not open to him after executing it to insist that the terms of the deed were different from

what he supposed them to be when he signed it. . . . And one who executes a deed cannot avoid it on the ground of ignorance of its legal effect. The rule on the subject is thus stated: 'A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practiced upon the grantor in procuring his signature and seal—a fraud which goes to the question whether the deed ever had any legal existence.' The law does not reach the cases of deeds procured by undue influence over the grantor, if he be of legal capacity. The only relief in such cases is in equity." Applying these principles to the facts of this case as related by the defendants, who testified in their own behalf, it would seem clear that the mortgage in question is not void, but voidable only in a court of equity. The defendant Mrs. McGirt stated that she had a good common-school education, and it appears that neither she nor the other defendant read the deed, or requested that it be read. They knew that the object of the deed was to raise \$1,000, which was to be invested together with the \$2,000, which it appears had already been invested by Davis. It is true that Davis deceived them by stating that the deed was not a mortgage, and that they "could do away with it in thirty days;" but they admit that they knew they were executing a "lien" upon their house for \$1,000, although they say they did not know it was the same as a mortgage. If they had read the deed, they would have discovered that it was a mortgage to the plaintiff, securing \$1,000, which she afterwards advanced upon the faith of the mortgage through her attorney, Mr. Cutlar. These and other circumstances relied upon by the defendants were not sufficient, in our opinion, to establish fraud in the *factum*. Indeed, the case does not seem to have been tried upon this theory, as the issue itself appears to have been framed for the purpose of presenting the proper view of the tendency of the testimony, which is that the deed was procured by fraud in the representation or treaty. To hold otherwise

would, it seems to us, be productive of the most alarming results as to the security and stability of titles in the hands of innocent purchasers, who have acted upon the faith of conveyances actually executed by the owners, and, as in this case, openly and freely acknowledged before the proper authority to be their act and deed.

The deed then being voidable only in a court of equity, and the jury having found that neither the plaintiff nor her attorney had notice of the fraudulent conduct of Davis in procuring the execution of the same, it becomes necessary to determine whether the instruction asked by the plaintiff should not have been given. This instruction relates to the issue involving the agency of Davis in making the transaction with Mr. Cutlar, the plaintiff's attorney, and must be considered in connection with the facts admitted in the testimony of the defendants. Could the defendants, under these circumstances, be permitted to say that they were not bound by the acts of Davis? "It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint. Suppose him to be prevailed upon by fraudulent representations to execute a deed without asking advice of friends or counsel, he has *locus penitentiae* when he goes before a magistrate to acknowledge it : " *Somes v. Brewer, supra*. These general principles are well sustained and illustrated by several decisions of this court and the numerous authorities therein cited, and are applicable, we think, to the question under consideration : Railroad Co.

v. Kitchin, 91 N. C. 39; *Vass v. Riddick*, 89 N. C. 6; *State v. Lewis*, 73 N. C. 138. According to the statements of the defendants, they intended to give a lien upon their property for \$1,000. This money, it must necessarily be inferred, was to be raised on the faith of the lien, and it was to be submitted to Davis, who was "to put it out" with the \$2,000 he had already invested, so that the defendants could get \$25 per month. The defendants, without reading the mortgage, executed the same, and it remained in the hands of Davis. Davis came the next day with the clerk of the court (Taylor), and the defendants acknowledged the due execution of the said mortgage, and it cannot be doubted that it remained in the hands of Davis in pursuance of the arrangement agreed upon. As we have said, had they read the instrument, they would have discovered that it was a mortgage to the plaintiff for the sum of \$1,000; and, so far as this case is concerned, it must be assumed that they were aware of its contents. At any rate, they admit that they knew it was a lien for that amount, and, under these circumstances, they permit the said Davis to take away the instrument obviously for the purpose of raising the money. In other words, by their gross negligence and blind confidence in Davis, they invested him with all the *indicia* of agency to obtain the money of the plaintiff upon the faith of this mortgage; and as between the plaintiff and these defendants, who are all innocent parties, it cannot be a question as to who should bear the loss. We think the instruction should have been given, and that, because of its refusal, there should be a new trial. Of course, if, upon another trial, it should appear that Mr. Cutlar had notice of facts sufficient to put him upon inquiry, the plaintiff would be affected by such notice, and the defendants be entitled to relief. We have examined the authorities cited by the counsel for the defendants, and see nothing in them which seriously conflicts with the principles we have declared in this opinion. The fact that the note was not exe-

cuted by the defendants does not in itself prevent a foreclosure of the mortgage: 1 Jones, Mort. 353.

New trial.

DIXON v. WILMINGTON SAVING AND TRUST CO.

ET AL.

(Supreme Court of North Carolina, November 27, 1894.)

The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore cannot be avoided in the hands of a person who in good faith advances money thereon.

Appeal from Superior Court, New Hanover county.

Action by Nancy Dixon against the Wilmington Saving and Trust Company and others to cancel a mortgage. The defendants demurred. Judgment for defendant. Plaintiff took this appeal.

T. W. Strange, for appellant.

George Rountree, for appellees.

SHEPHERD, C. J.—However much we may sympathize with the plaintiff, who, like the defendants in the case of *Medlin v. Buford* (decided at this term), 20 S. E. 463, has been cheated and defrauded by reason of her perfect confidence in the rectitude and piety of John C. Davis, we are unable to see how we can grant her the relief prayed for. To do so would amount to the abrogation of some of the plainest principles of jurisprudence, and so unsettle the law that but little confidence could hereafter be placed in those solemn assurances of title so necessary to the welfare and repose of society. The grave results of holding a deed, executed under the present circumstances, to be void, and not voidable merely, are mentioned in the case of *Medlin v. Buford*, *supra*, in which will also be found an enunciation of the principles which apply to this appeal. There is no

pretense here that the plaintiff did not intend to sign and deliver the instrument in question. She alleges that she consented to do so, and executed the same without reading or having it read to her. In addition to the authorities cited in *Medlin's Case*, *supra*, we will add the case of *Commissioners v. Kesler*, 67 N. C. 448, in which it was held that if a grantor, although an illiterate man, executes a deed without demanding that it be read, or elects to waive a demand for the reading, the deed will take effect. See, also, 1 *Devl. Deeds*, 225, where it is said: "It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared if required; but, if the party who should deliver the deed doth not require it, he should be bound by the deed, although it be penned against his meaning." It being very clear, then, that the deed is not void by reason of fraud in the *factum*, it must follow that it can only be avoided in equity; and, for the reasons given in *Medlin's Case*, that court will never grant relief against an innocent party, who has been induced to part with his money on the faith of a mortgage duly executed according to law. By the gross negligence of the plaintiff, she allowed herself to be imposed upon by the fraudulent representation of Davis, and executed a mortgage directly to the defendant trust company. She delivered this mortgage to Davis, and upon the faith of this deed, acting presumably as her agent, he obtained the money. This is one of those "hard cases" that are sometimes called the "quicksands" of the law, but the improvidence of the few should not tempt the courts to depart from those well-settled principles upon which depend the safety and security of the many. The judgment sustaining the demurrer is affirmed.

A person who can read is presumed to know the contents of an instrument signed by him, and if he sign without reading he is guilty of such negligence that, unless he was prevented from reading by some trick or device, which would reasonably justify

his signing without reading (and it is manifest such a case must be a very rare one except where confidential relations exist between the parties), he cannot ask for equitable relief if he afterwards find that he has executed a paper of a different character from what he thought it: *Greenfield's Estate*, 14 Pa. 489.

Where an illiterate person signs a deed, the contents of which are misrepresented to him, it is not his deed: *Thoroughgood's Case*, 9 Rep. 96; *Green v. North Buffalo Township*, 56 Pa. 111; *Schuykill Co. v. Copley*, 67 Ib. 386; but if he sign merely without demanding that it be read to him it is binding upon him: *Thoroughgood's Case*, *supra*; for it is gross negligence to sign without demanding that it be read: *Ætna Life Ins. Co. v. Franks*, 53 Iowa, 618; *Roach v. Kansas*, 18 Kan. 529; *Frickee v. Donner*, 35 Mich. 151; and, even where actual fraud or misrepresentation is set up, one who has signed a paper without demanding that it be read to him cannot obtain relief upon his own uncorroborated testimony: *Pennsylvania R. R. Co. v. Shay*, 3 W. N. C. 45; he will not, however, be absolutely barred from relief by his negligence: *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40. The mere fact that a mortgage was not read to an illiterate mortgagor will not, in the absence of proof of fraud on the part of the mortgagee, enable the mortgagor to object that it contains an unauthorized stipulation, especially when the paper was drawn by the mortgagor's agent: *Jones on Mortgages*, § 625; *Wilson v. Winter*, 6 Fed. Rep. 16; *Montgomery v. Scott*, 9 So. Car. 20; *Leslie v. Merrick*, 99 Ind. 180; *Stewart v. Whitlock*, 58 Cal. 2; *McAlarney v. Paine*, 10 Atl. 20.

Equity jurisdiction—Recovery of legacy—Charitable bequest—Certainty as to beneficiary.

**DOMESTIC AND FOREIGN MISSIONARY SOCIETY
OF THE PROTESTANT EPISCOPAL CHURCH IN
THE UNITED STATES OF AMERICA v. GAITHER
ET AL.**

(United States Circuit Court, D. Maryland, June 18, 1894.)

[Reported 62 Federal Reporter, 422.]

A bill, by a legatee against an executor, to recover a legacy claimed by him to be void under the state law, is within the equitable jurisdiction of the federal courts.

A bequest of a certain sum to an incorporated missionary society whose whole mission work is divided into two branches, domestic and foreign, is not rendered void for uncertainty of beneficiary or purposes by the addition of a direction to apply it to domestic missions, as such legacy is not to be considered as held upon any trust, but to be expended by the corporation in its regular domestic mission work, as distinguished from its foreign mission work.

This was a suit against executors to recover a legacy bequeathed thereby to complainant.

Campbell W. Pinkney, for plaintiff.

Wm. S. Bryan, Jr., Edward N. Rich and George R. Gaither, Jr., for defendants.

MORRIS, D. J.—This is a bill in equity filed by the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation of the state of New York, against the executors of the will of Hannah B. Gaither, late of Baltimore (who are citizens of Maryland), to recover a legacy of \$5,000 bequeathed by said will to the said corporation.

On behalf of the defendants it has been suggested that a federal court of equity, being prohibited from taking jurisdiction of a case where there is a plain, adequate and com-

plete remedy at law, cannot take jurisdiction of this case. A bill by a legatee against an executor to recover a legacy, because of the inadequacy in most cases of the remedy at law, is firmly established as one of the cases proper for equitable relief, and the jurisdiction of courts of equity in such cases is constantly maintained, and the right to sue at law is denied, by decisions in both state and federal courts: 1 Story, Eq. Jur., § 591; 3 Pom. Eq. Jur., § 1127; *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9341; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376; *Coates v. Mackie*, 43 Md. 127. There may be an adequate remedy at law when the executor has promised to pay the legacy, but that is not this case.

The objection of the executors to the payment of this legacy is that it is void under the rule of law in Maryland, as established by its highest court with regard to bequests for the benefit of beneficiaries who are uncertain and indefinite. If this contention can be maintained, it is not to be questioned that the law of Maryland, if so established, is the law which must be administered by this court: *Meade v. Beale*, Taney, 339, Fed. Cas. No. 9371. The bequest is as follows:

"I give and bequeath to the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and their successors and assigns, the sum of \$5,000, and I request and desire that the said sum of \$5,000 be applied to domestic missions."

It is conceded that the corporation intended by the testatrix, and designated in her will by its proper corporate title, is the corporation now suing, and that it was incorporated by a legislative act of the state of New York passed May 13, 1846. It was constituted a body corporate "for the purpose of conducting general missionary operations in all lands," with power to take gifts and bequests for the objects above stated, or any purpose connected with such objects, and with power to the general convention of the Protestant Episcopal

Church in the United States to make rules and regulations, and amend the constitution of the corporation as it might deem proper to promote the purposes for which it was incorporated.

The contention of the defendant is, first, that by the words appended to the gift, viz.: "I request and desire that the said sum of \$5,000 be applied to domestic missions," the testatrix must be held to have meant domestic missions generally, just as if she had given the bequest to an individual, with the request that it be applied to domestic missions. If this were the fair interpretation of the words, the bequest would have to be held a trust so indefinite as not to be enforceable, and therefore void in Maryland. But I do not take this to be the fair meaning of the words used by the testatrix. The legatee was a corporation which, as its corporate name indicates and as its charter provides, has for its immediate object two purposes—one domestic, the other foreign missions. The proof establishes that it has for many years carried on missionary work extensively in both these fields. It is conceded that if the bequest had been simply to the corporation by its corporate name, without request as to the application of the gift, it would have been valid; and it seems to me that the reasonable meaning of the words "to be applied to domestic missions" is not that the gift is to be applied to domestic missions generally, but to the domestic missions operated by that corporation, or, in effect, to its domestic missions as distinguished from its foreign missions.

It is, however, earnestly contended on behalf of the defendants that even if the wording of the bequest may be read as if the testatrix had said, "I request and desire that said sum be applied to said corporation's domestic missions," still the legacy must be held void under the Maryland decisions, as being a bequest to the corporation to be held by it for a designated purpose, which purpose is so indefinite and uncertain that there is no *cestui que trust* who

could enforce it. The case principally relied upon to support this contention is *Church Extension v. Smith*, 56 Md. 362. In that case, a clause of the will was as follows :

"To the Church Extension of the Methodist Episcopal Church incorporated by the legislature of Pennsylvania, the sum of \$10,000 to be used as part of the perpetual loan fund of said society, and to bear the name of the 'Durham Loan Fund.'"

By its charter it was provided :

"That the said corporation shall be also competent to act as trustee in respect to any devise or bequest pertaining to the objects of said corporation, and devises and bequests of real or personal property may be made directly to said corporation or in trust for any of the purposes comprehended in the general purposes of said society ; and such trusts may continue for such time as may be necessary to accomplish the purposes for which they may be created."

By the agreed statement of facts it appeared :

"That by a rule adopted by the corporation before the making of the testatrix's will, and which was still in force, any one donating \$5,000 or more to the loan fund may designate the name by which said contribution shall be known. The said loan fund is set apart to be loaned to necessitous churches of the Methodist Episcopal Church erected from time to time within the limits of the United States and its territories, and the beneficiaries and recipients thereof are such of said churches as the said committee in charge of said fund for the time being may in their discretion select."

It was contended by counsel opposing the validity of this bequest that: "When the testatrix, therefore, gave this bequest, it is manifest she did not intend it to be used for the general purposes of the corporation, but that it should forever be kept apart and used for a class, as well defined as any indefinite class can be ; and to emphasize this trust she earmarked it by the name of the 'Durham Loan Fund.'"

This was the conclusion arrived at by the Court of Appeals of Maryland. On page 397 the court, speaking by Chief Justice BARTOL, said :

"It thus appears that the legacy is not given to the corporation for its own use. It cannot, according to the terms of the will, be used for its general purposes ; but the testatrix, by directing that it shall be held as a part of the loan fund, has constituted the corporation a trustee, charged with the duty of employing the fund only for the benefit of necessitous Methodist churches in the United States. These are the real beneficiaries for whose use the legacy is given. It seems to us very clear that such a trust is so indefinite that it could not be enforced. According to the uniform course of decisions in this state, a trust cannot be upheld unless it be of such a nature that the *cestuis que trustent* are defined, and capable of enforcing its execution by proceedings in a court of chancery."

It appears, therefore, that the decision of the Court of Appeals was controlled by the fact, found by the court, that the testatrix had constituted the corporation a trustee, and had charged it with the duty of employing the fund for the use and benefit of necessitous Methodist churches, and that this was not one of the general purposes of the corporation, but was a trust so indefinite that it could not be enforced. That the court would not have held the gift void if the fund had been given for one of the general purposes of the corporation is made apparent by the subsequent decision of the same court in the case of *Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244. In this latter case the bequest was as follows :

"I give and bequeath to the Eutaw Place Baptist Church of Baltimore City the sum of \$1,000 ; the income, interest and proceeds thereof to be applied to the Sunday-school belonging to or attached to said church."

As to this bequest, the court, speaking by Chief Justice ALVEY, said :

"If the bequest had simply been to the church, without reference to the Sunday-school, there could have been no question of its validity, and the church could have applied the fund to any purpose, and to promote any object within the sphere of its corporate powers and functions as a religious body. But it is contended that the Sunday-school is an unincorporated body, independent of the church, and, therefore, without legal entity, and the bequest to the church is in trust for this undefined and uncertain body of individuals that fluctuates from time to time without legal succession, and consequently the bequest is void because of this uncertainty and want of legal identification of the objects to be benefited by the bequest. In this contention we do not concur. . . . The Sunday-school, as such, is not an incorporated body it is true; but it is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church."

Also, in *Halsey v. Convention*, 75 Md. 275, 23 Atl. 781, it was held by the Court of Appeals with regard to the convention of the Protestant Episcopal Church of the Diocese of Maryland, a body corporate having power to take and hold property for church or parish schools, that a devise to it for the purpose of founding a church school for boys was valid.

In the case in hand it is shown by proof that the whole work for which the complainant corporation was organized, and which it in fact carries on, is mission work, divided into two branches—domestic and foreign. It carries on its work through the agencies which, in accordance with its constitution, it has established; and when money is given to it, with the request or direction that it be used for domestic missions, it is used in support of that department, and money given for foreign missions is used in support of that department, and the money given without any request is divided equally between the two. It would seem, therefore,

that money given to the corporation as this legacy was is not to be held by it upon any trust, but is to be expended by it in the missionary work which it carries on within the United States. It carries on its missions and missionary work through the instrumentality of boards, committees, treasurers, bishops, clergymen and agents; being a corporation, it can only act through its officers and agents, but the work is its own immediate and special work. This is not a case in which there is a trust or trustee or *cestui que trust*. It is a direct expenditure by a corporation for the very object for which it was created. It is therefore not within the ruling of the Court of Appeals of Maryland in the case of *Church Extension v. Smith*, 56 Md. 362, and is even stronger in its facts than the case of *Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244, in which that court sustained the validity of the bequest as being for one of the corporate uses of the donee. In the Case of *Look* (Sup.), 7 N. Y. Supp. 298, it was held that a bequest to the American Bible Society "to be used for the promulgation of the Holy Bible," was a gift limited to the very use for which the donee was incorporated, and not a trust for an indefinite beneficiary, and was valid: *Wetmore v. Parker*, 52 N. Y. 458.

Decree in favor of complainant for \$5,000, and costs, with interest from date of the decree.

A common ground of attack upon a charitable devise is its vagueness either as to its subjects or objects, or method of execution. Every intendment is to be made in favor of the charitable intent of a testator, and if the words can be so construed as to support a devise without outraging the plain rules of common sense, a court will feel bound to carry the will into effect: 3 Shars. & Budd's Lead. Cas. 371; *Bartlet v. King*, 12 Mass. 543; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 117; *Jackson v. Allen*, 539. A discretion vested in a trustee or other person to select the objects of the charity, whether of a certain specified kind or general, may uphold a charitable bequest which would

otherwise be void for vagueness: *Whitman v. Lex*, 17 S. & R. 88; *McLain v. School Directors*, 51 Pa. 196; *Pickering v. Shotwell*, 10 Ib. 23; *Power v. Cassidy*, 79 N. Y. 602; *Gumble v. Pfluger*, 62 How. Pr. 118; Domestic and Foreign Missionary Society's Appeal, 30 Pa. 425; *Kinike's Estate*, 155 Pa. 101; *Howe v. Wilson*, 90 Mo. 45; *Raley v. Umatilla Co.*, 15 Oreg. 172; *Minot v. Baker*, 147 Mass. 348. This rule is not confined to wills, but has been applied to charities created by grant or agreement *inter vivos*: *Beaver v. Filson*, 8 Pa. 327; *Raley v. Umatilla Co.*, *supra*. Where a trustee is appointed and no rule or order of selection is ordained by the testator or founder, a power of selection vests by implication in the trustee: *Re Taylor's Orphan Asylum*, 36 Wisc. 534; *Dodge v. Williams*, 46 Ib. 70; *Woodruff v. Marsh (Conn.)*, 26 Atl. 846. And in some cases where no trustees have been appointed but the charitable intent is clear, a power of selection vests in the executors: *Claypool v. Norcross*, 42 N. J. Eq. 545; and in such case where there are neither executors in whom the discretion can vest, nor trustees, the discretion may be raised in trustees to be appointed by the court, as in *Hunt v. Fowler*, 121 Ill. 269, where there was a bequest to be distributed amongst the "worthy poor of L." But a will may be so drawn as to deny all discretion to the trustee, in which case, if the charity be too vague otherwise, it cannot be saved by a presumed intention to vest a power of selection; thus in *Fairfield v. Lawson*, 50 Conn. 501. There was a devise "in trust for the education of the freedmen . . . the income to be paid to the proper officers of the Freedman's Association." No association of that name was in existence, although there were several organizations having for their object the education of emancipated blacks. The court held the devise void for vagueness and that all discretion was taken from the trustees by the direction to pay over. And see *Grimes v. Harmon*, 35 Ind. 198; *Rhodes v. Rhodes*, 88 Tenn. 637. In *Re Fuller's Will*, 75 Wisc. 431, there was a devise, to the deacons of a certain church, of a fund to be loaned on good security and the interest to be paid to the American Baptist Society, to be used in the support of a Baptist colporteur and missionary in Wisconsin, no indication being made as to the duties of said colporteur or missionary, or where or

with whom he was to work; the devise was held void. The depositary of the discretion may be an unincorporated association: *Pickering v. Shotwell*, 10 Pa. 23; or a court: *Hunt v. Fowler*, 121 Ill. 269; but the discretion cannot be vested in a body entirely non-existent, either as a corporation or an unincorporated corporation: *Zeissweiss v. James*, 63 Pa. 465.

In New York, the rule above stated as to the effect of lodging a discretion does not obtain, for, although some of the authorities above cited favor the rule, and see, also, *In re Hagenmeyer's Will*, 12 Abb. N. C. 432; *Gumble v. Pfluger*, 62 How. Pr. 118; yet the rule is laid down in *Levy v. Levy*, 33 N. Y. 107; *Prichard v. Thompson*, 95 Ib. 76; *Holland v. Alcock*, 108 Ib. 312; *Read v. Williams*, 125 Ib. 560, that a trust without a certain beneficiary who can claim its enforcement is void. In the last-cited case a bequest "to such charitable institutions and in such proportion as my executors, by and with the advice of my friend, Rev. John Hall, D. D., shall choose and designate," was held void although the executors and Dr. Hall expressed their choice in favor of certain charitable corporations to whom devises, if made directly, would have been valid; and in the celebrated *Tilden Will Case*: *Tilden v. Green*, 130 N. Y. 29, the same doctrine was maintained; the testator devised the residue of the estate to his executors for two lives in being, and requested them to forthwith incorporate the Tilden Trust for the purpose of maintaining a free library and to promote such scientific and educational objects as they might more particularly designate, and authorized them to convey to such Trust all the residue of the estate or so much as they deemed expedient. In case the "Trust" were not incorporated within the two lives, or if, for any reason, the executors should deem it inexpedient to convey the residue to the Trust, then they were authorized to apply it to such charitable, educational and scientific purposes as in their judgment would render it most widely and substantially beneficial to the interests of mankind. The Court of Appeals held the devise invalid, because there was no certain designated beneficiary who could enforce the trust and it rested entirely on the discretion of the trustees to give such part of the estate as they deemed expedient to the Tilden Trust or to withhold all from it. Three

judges dissented. And see the article of Mr. Richard C. McMurtree in 31 Am. Law Reg. (N. S.) 235.

The discretionary power of selection must be confined within strictly *charitable* limits; if there be a discretion to apply to works of charity or *benevolence*, the bequest will be void, as *benevolence* is a word of greater legal extent than charity: *Thomson's Exr. v. Norris*, 20 N. J. Eq. 489; *Chamberlain v. Stearns*, 111 Mass. 267; *Morice v. Bishop of Durham*, 9 Ves. 399; *James v. Allen*, 3 Meriv. 17; *Mitford v. Reynolds*, 1 Ph. 185; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Williams v. Williams*, L. J. N. S. Eq. 84; *Nash v. Morley*, 5 Beav. 177; *Kendall v. Granger*, Ib. 300; *Jarman's Estate*, L. R. 8 Ch. D. 584; but if the mere use of the word *benevolent*, or *benevolence*, will not determine the question; for the context, may show that the testator had in mind charitable purposes, in which case the trust will be sustained: *Goodale v. Morey*, 60 N. H. 528; *Pell v. Mercer*, 14 R. I. 412; *Suter v. Hilliard*, 132 Mass. 412; *Rotch v. Emerson*, 105 Ib. 431; *Saltonstall v. Sanders*, 11 Allen, 446; *Morice v. Bishop of Durham*, 10 Ves. 522; *Whicker v. Hume*, 7 H. L. C. 124; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Erskine v. Whitehead*, 84 Ind. 357.

A definite charitable character may be impressed upon an otherwise vague bequest, by the character of the trustee, or of the legatee or devisee, where it is a well-recognized charitable or religious organization or society, the testator being presumed to have been familiar with the object of the society and to have intended that his bounty should be appropriated thereto: *Carter v. Balfour*, 19 Ala. 814; and the purpose of the bequest or devise need not in such case be set out: *Evangelical Association's Appeal*, 35 Pa. 316; *Haddon v. Dandy*, 51 N. J. Eq. 154 *aff'd.* *Dandy v. Methodist Society of Ireland*, Ib. 330, and a devise to the treasurer of a charity, in his official capacity, for the sole behoof of the charity has been upheld: *Beall v. Surviving Executors of Fox*, 4 Ga. 404; *Executors of Burr v. Smith et al.*, 7 Vt. 243.

A devise to a charity may be good although it require the creation of a corporation to carry it into effect, when it appears from the will that the creation of such corporation was within the contemplation of the testator: *Goodell v. Union Ass'n*, 29

N. J. Eq. 32; *Ould v. Washington Hospital*, 50 Otto, 303; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Trustees of Cory Universalist Society v. Beatty*, 28 N. J. Eq. 575; *Gould v. Taylor's Orphan Asylum*, 46 Wisc. 106; *Coit v. Comstock*, 51 Conn. 352; *Field v. Drew Theological Seminary*, 41 Fed. Rep. 371; *Lewis's Estate*, 1 Pa. Dist. Rep. 423; but a void bequest to an unincorporated body will not be rendered good by an incorporation effected subsequently to the testator's death and which is not contemplated in the will: *Owens v. Missionary Society*, 14 N. Y. 380; *Miller v. Porter*, 53 Pa. 292; but where the gift is to take effect *in futuro*, if on the arrival of the time for taking effect, the devisee for charitable uses has become incorporated, the devise will be upheld, although it was an unincorporated association at the time of the testator's death: *Loughhead v. Dikeman's Bapt. Church and Soc.*, 129 N. Y. 211.

A corporation may be a trustee of a charity, if not prohibited to act as such either by general statute or the peculiar law of its own existences: *Vidal v. Girard's Exrs.*, 2 How. 127; *Perin v. Carey*, 24 Ib. 467; *McDonough's Exrs. v. Murdoch*, 15 Ib. 367; *American Colonization Society v. Gartrell*, 23 Ga. 448. In *Jones v. Habersham*, 3 Woods, 443, it is intimated that the qualification of a corporation to act as trustee may be limited to trusts whose objects are "germane to or in harmony with the objects of the corporation." In *Chapin v. School District No. 2*, 35 N. H. 445, the test was said to be the absence of repugnance to the object of the corporation; and see *Silcox v. Harper*, 32 Ga. 639. In *Mayor v. Elliott*, 3 Rawle, 170, it was held a municipality might act as trustee for a charity whose objects would fall within the general duties of the municipality; in that case a hospital for the indigent lame and blind; so of a trust for educational purposes: *Vidal v. Girard's Exrs.*, *supra*; and so of a trust for the aid of the orphan poor: *Dascomb v. Marston*, 80 Me. 223; *Board of Commissioners of La Grange County v. Rogers*, 55 Md. 297. But it is held by some authorities that a municipality has no power to act as trustee for the benefit of poor persons whom it is under no legal liability to support: *Fosdick v. Hempstead*, 125 N. Y. 581; or deserving persons not paupers: *Dailey v. New Haven*, 60 Conn. 314. In New Jersey it has been held that a township is not a proper trustee of a fund for educating poor orphan

children: *Mason's Exrs. v. Trustees of Methodist Episcopal Church*, 27 N. J. Eq. 47.

One charitable organization may hold property in trust for another: *Jones v. Habersham*, *supra*; *Sheldon v. Chappell*, 47 Hun, 59.

In states in which the doctrine of charitable uses obtains, a charitable devise may be made to unincorporated charitable societies: *Zimmerman v. Anders*, 6 W. & S. 218; *Gibson v. McCall*, 1 Rich. L. 174; *Carter v. Balfour*, 19 Ala. 814; *Johnson v. Maynes*, 4 Iowa, 180; *Bartlett v. Nye*, 4 Metc. 378; *Wright v. Trustees of Methodist Episc. Ch.*, 1 Hoff. 207; *King v. Woodhull*, 3 Edw. Ch. 79 (these New York cases were decided before the doctrine of charitable uses was declared non-existent in that state); *Thompson v. Swope*, 24 Pa. 474; *Evangelical Association's Appeal*, 35 Pa. 207; *Halsey v. Convention of P. E. Church (Md.)*, 23 Atl. 781.

The following devises have been sustained as not too vague: to an unincorporated body for the poor of the society: *Zimmerman v. Anders*, 6 W. & S. 218; to the poor of certain churches: *Yard's Appeal*, 64 Pa. 95; to incorporated churches of a certain denomination in a certain city, to the end that the poor of said churches be cared for: *Auch's Succession*, 39 La. Ann. 1043; for the colored children of a certain state: *Craig v. Secrist*, 54 Ind. 419; for such poor white citizens of Kent county who by timely assistance might be kept from the poor-house: *Griffith v. State*, 2 Del. Ch. 392, 421; to the poor of certain specified districts: *Williams v. Pearson*, 38 Ala. 298; *Hornberger v. Hornberger*, 12 Heisk. 635; *State v. Gerard*, 2 Ired. Eq. 210; *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Ib. 115; *Board of Commissioners of La Grange County v. Rogers*, 55 Ind. 297; *Urmey's Exrs. v. Wooden*, 1 Oh. St. 160; *Deering v. Adams*, 37 Me. 264; for a school for a neighborhood: *Martin v. McCord*, 5 Watts, 493; for the education of the poor children of a county: *Franklin v. Armfield*, 2 Sneed, 305; *Newson v. Starke*, 46 Ga. 88 (overruling *Beall v. Drane*, 25 Ib. 430); for "the scholars of poor people:" *Clement v. Hyde*, 50 Vt. 716; to the education of colored children in a certain state: *Lindley's Case*, 32 Ind. 367; for "the distribution of good books among poor people in the back part of Pennsylvania, or to the support of an institu-

tion or free school in or near Philadelphia:" *Pickering v. Shotwell*, 10 Pa. 23; "in trust for the cause of peace, to be paid over to the executive committee of the American Peace Society:" *Tappan v. Deblois*, 45 Me. 123; "to the cause of Christ:" *Goring v. Emery*, 16 Pick. 147; "to the suffering poor of the town of Auburn:" *Howard v. American Peace Society*, 49 Me. 288; to —, of Boston, "to apply the same to the relief of the destitute in such manner as charity is usually distributed by the ministers at large in the city of Boston:" *Derby v. Derby*, 4 R. I. 414; "for the founding of a home for aged, respectable, indigent women, who have been residents of the city of New London, under such regulations as may be provided by such act of incorporation:" *Coit v. Comstock*, 51 Conn. 352; for the promotion of education and science among Indian and African youth, a power of selection being given to trustees: *Treat's Appeal*, 30 Conn. 113; "for educating some poor apprentices of this county, to be selected by the city court:" *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354, 369; "to found a free school for orphans or the children of poor parents who in the judgment of my trustees are best entitled to the donation:" *Griffin v. Graham*, 1 Hawks, 96; to one of two specified charities, "whichever may be deemed best:" *Fairbanks v. Lamson*, 99 Mass. 533; to advance the Christian religion, a discretion being lodged in the executor: *Miller v. Teachouts*, 24 Oh. St. 525; for the education "of the freedmen of the nation:" *McAllister v. McAllister*, 46 Vt. 272; for the sole relief and benefit of poor widows of irreproachable character, who have resided not under three years within eight miles of the town of W., and who have no certain income: *De Bruler v. Ferguson*, 54 Ind. 549; to deserving relatives and such indigent persons as the executors may think worthy of the same, and in such manner as they may think proper: *Drew v. Wakefield*, 54 Me. 291; to a school society in the town of R. for the use and benefit of such families in said society in their schooling as shall not exceed in the list of the town for the year, the sum of \$50: *Birchard v. Scott*, 39 Conn. 63; to purchase fuel to be given or sold at low prices to such worthy and industrious persons as are not supported in whole or in part at the public expense: *Webb v. Neal*, 5 Allen, 575; for a home for respectable, destitute, aged native-born

American men and women: *Odell v. Odell*, 10 Allen, 1; to provide groceries for the sick and infirm, and clothing and fuel for the helpless and needy: *Washburn v. Sewall*, 9 Metc. 280; in trust for the poor orphans of a state, a power of selection being provided for: *Miller v. Atkinson*, 63 N. C. 537; to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessities: *Grandom's Estate*, 6 W. & S. 537; to apply interest for a certain time to the support of N. township, then to keep the principal for the use of the county: *County of Lawrence v. Leonard*, 83 Pa. 206; for the education and tuition of worthy indigent females: *Dodge v. Williams*, 46 Wisc. 70, 106; for the education of poor and needy children in B. and to furnish them with necessary clothing while attending school: *Swasey v. American Bible Society*, 57 Me. 523; for an asylum for destitute orphan boys and girls at M.: *Milne v. Milne*, 17 La. 46; to aid indigent young men in fitting themselves for the evangelical ministry: *Trustees v. Whitney* (Conn.), 8 Atl. 141; to an incorporated parish for its poor, although there were no such poor at the time of testator's death: *Goodrich's Appeal* (Conn.), 18 Atl. 49; "some poor deserving Jewish family residing in New Haven:" *Bronson v. Strouse*, 57 Conn. 147; for "an art institute:" *Almy v. Jones*, 17 R. I.; to a church, to be applied to foreign missions: *Kinney v. Kinney*, 86 Ky. 610; for a home for destitute and friendless children: *Woodruff v. Marsh*, 63 Conn. 125; to a religious society "to help in the support of preaching so long as such is kept up as at present:" *King v. Grant*, 55 Conn. 166; for the benefit of poor churches in a certain city and vicinity: *McAllister v. Burgess*, 161 Mass. 269.

The following are instances in which a charitable devise has been held void for vagueness. A devise to a bishop and his successors "to dispose of said real estate and apply so much thereof to the church or to the education and maintenance of poor children as he in his wisdom should think proper and legal:" *Lepage v. McNamara*, 5 Iowa, 124. The authority of this case is doubtful, in view of the late decisions in Iowa, and it is to be noted that it was a case at law. A gift "towards the building of a boys' reformatory, if such an institution should be established for the Catholic boys of the state under the direc-

tion of Bishop G. or his successor . . . the residue to the Rt. Rev. Bishop G. or his successor for a Catholic reformatory for boys in this state of Connecticut:" *Hughes v. Daly*, 49 Conn. 34. The court, see the opinion of PARDEE, J., thought the word "reformatory" too broad to be definite, but see the opinion of the same court in *Coit v. Comstock*, *supra*, where "home" was not considered to be too vague. A bequest to trustees for the support of indigent and pious young men preparing for the ministry in New Haven: *White v. Fisk*, 22 Conn. 31; a devise "to be applied to home missions:" *Bridges v. Pleasants*, 4 Ired. Eq. 26; for the poor of a certain city which had neither paupers nor poor fund: *Hoffen's Estate*, 70 Wisc. 522; for the promotion of the cause of temperance: *People v. Dashaway Association*, 84 Cal. 114; for the education of young men for the priesthood and to educate orphan boys and girls, there being no limitation as to the individual objects of the charity. *Brennan v. Winkler*, 37 So. Car. 457; "for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable:" *Johnson v. Johnson*, 92 Tenn. 559.

In states where the doctrine of charitable uses has been repudiated, we find the following declared void for indefiniteness as to beneficiaries "for feeding, clothing and educating the poor children belonging to the congregation of St. Peter's P. E. Church in the city of Baltimore:" *Dashiell v. Atty.-Gen.*, 5 H. & J. 446; and see *Same v. Same*, 6 Ib. 1; "to the real distressed poor of Talbot County." *Trippe v. Frazier*, 4 Ib. 446; to the mayor and city of Baltimore, to be applied under the direction of said corporation "to the relief and support of indigent and necessitous persons who may from time to time reside in the Twelfth ward, as now known, of Baltimore." *Wilderman v. Mayor*, 8 Md. 551, a bequest of a fund to be applied by the executor to the support of missionaries in India, under the direction of a certain board of missions. *Presbyterian Church v. White's Administrators*, 4 Am. Law Reg. 526; to the Educational Society of Virginia, for the benefit of theological students at the Protestant Episcopal Seminary, near Alexandria, D. C.: *Meade v. Beale*, Taney C. C. Dec. 339; to trustees, to permit all and every person "belonging

to the Roman Catholic Church . . . residing in Richmond at the time of the testator's death, to build a church on the lot for the use of themselves and all others of that religion who may hereafter reside in Richmond:" *Gallego's Exr. v. Atty.-Gen.*, 3 Leigh, 450; in trust "for such purposes as they consider promise to be most beneficial to the town and trade of A.:" *Wheeler v. Smith*, 9 How. 55; for the education of free colored persons in B. *Needles v. Martin*, 33 Md. 609; for a perpetual loan fund "to be set aside to certain necessitous churches of the Methodist Episcopal Church, to be selected by a committee of the Church Extension Society." *Church Extension of the Methodist Episcopal Church v. Smith*, 56 Md. 362; "to the trustees of the Mary Hoyt school-house, for educational purposes, and to the African Missionary Society (neither body being incorporated) for the purpose of converting and christianizing the African race:" *Rizer v. Perry*, 58 Md. 112, a bequest in trust to enclose the Mount Pleasant church and graveyard: *Wilson v. Perry*, 29 W. Va. 169; to purchase a parsonage for the Mt. Pleasant church; for the Presbyterian Sunday-school at Union; for the Home Mission of the Presbyterian church: *Ib.*

Fraud—Concealment—Rescission—Evidence—Estoppel.

**TEXAS ELEVATOR AND COMPRESS COMPANY *v.*
MITCHELL.**

(Court of Civil Appeals of Texas, April 18, 1894.)

One who, being about to purchase from another, knows that the vendor has been deceived as to material facts affecting the value of the subject of sale by untrue reports given to him by third persons, and nevertheless, without informing the vendor of the truth, purchases for an inadequate consideration, is guilty of such fraud as will entitle the vendor to relief by rescission.

The above rule applies to the assignment of a judgment. Relief will be given, as against actual fraud in procuring the assignment of a judgment, although it may not appear that the assignee had any right to rely upon the representations of the assignee by reason of the existence of any fiduciary relation between the two.

A judgment debtor, who accepts a release fraudulently procured by another, with a full knowledge of the fraud, cannot deny the agency of the other in procuring the release.

In a proceeding to set aside an assignment of judgment against a corporation, it appeared that the plaintiff was misled by newspaper reports that this judgment had been reversed and remanded, when, in fact, it had been affirmed; that a majority holder of stock in the corporation had a copy of the opinion procured by his agent, who immediately entered into negotiations with the plaintiff for the purchase of the judgment with money provided by the stockholder; that after making the purchase the agent released the judgment without consideration; and that certain bonds deposited by the corporation to secure its bondsmen on appeal were released and sent to such stockholders. *Held*, testimony that the broker whom the agent employed to negotiate the assignment, represented himself as agent of the defendant was admissible.

Appeal from District Court, Dallas county.

Action by T. B. Mitchell against the Texas Elevator and Compress Company to set aside an assignment of a judgment in his favor against defendant, or, in the alternative, for damages sustained by reason of the fraud practiced on plaintiff by defendant's agents in securing from him the assignment. C. F. Carter, Royal A. Ferris and W. White, defendant's bondsmen on an appeal from the judgment in question, and Chapman Bradford, as its agent in the transaction, were co-defendants. Judgment was rendered against defendant company and for its co-defendants, and it appealed.

Alex. White and McCormick & Spence, for appellants.

Watts, Aldredge & Eckford, for appellee.

LIGHTFOOT, C. J.—The following statement of the case by appellant is concurred in by appellee, and is substantially correct: Suit by T. B. Mitchell, plaintiff, against the Texas Elevator and Compress Company, a private corporation, C. F. Carter, Royal A. Ferris, W. White and Chapman Bradford, defendants, to set aside a sale, transfer and assignment of a judgment made by plaintiff, or, in the alternative, for damages against defendants. Plaintiff alleged that

on May 18, 1887, he recovered a judgment against defendant herein, the Texas Elevator and Compress Company, in the District Court of Dallas county, Texas, for the sum of \$15,200, with interest thereon at eight per cent. and costs, from which defendant the Texas Elevator and Compress Company took and perfected an appeal to our Supreme Court; that defendants herein, C. F. Carter, Royal A. Ferris and W. White, became sureties on the *supersedeas* appeal bond, which was in the sum of \$35,000, conditioned as required by law; that, pending the appeal, plaintiff caused an abstract of his said judgment to be properly recorded and indexed, and thus same became a lien on all lands of defendant the Texas Elevator and Compress Company in Dallas county; that afterwards, on June 24, 1890, the Supreme Court affirmed said judgment (14 S. W. 275), and it was by said Supreme Court adjudged that plaintiff, T. B. Mitchell, recover of the defendant the Texas Elevator and Compress Company, and its said sureties on the appeal bond, the amount adjudged below and costs; that the Dallas Morning News, however, contained a report of said case, and in its issue of June 25, 1890, said paper reported that same had been reversed and remanded; that plaintiff was then absent from the state, but on June 26 he returned to his home, in Dallas, and was then and there informed by his family and friends that the Supreme Court had reversed and remanded said suit, and that it had been so reported in the newspapers; that from thence, and until, to wit, the 11th day of August, 1890, the plaintiff firmly believed that the Supreme Court had reversed said judgment and remanded said cause; that on the 8th day of July, 1890, one Francis L. Randle, who claimed to be acting therein for and as agent of the defendant the Texas Elevator and Compress Company (and plaintiff so believes and is informed that the said Randle was so acting), approached plaintiff, and proposed a compromise and settlement of said cause, and then and there stated and represented that said judgment had

been reversed and remanded by the Supreme Court; that, in making the proposed compromise and settlement, the said Randle and said defendant Chapman Bradford and the officers of the Texas Elevator and Compress Company were acting together, and in the interest and in behalf of said Texas Elevator and Compress Company, and to that end and purpose they, together with the other defendants and other persons unknown to plaintiff, had combined, confederated and conspired together for the purpose and with the intent to cheat, wrong and defraud the plaintiff, they knowing that plaintiff believed that said cause had been reversed and remanded, but themselves knowing that same had been affirmed; that defendants, in furtherance of said combination and conspiracy to cheat, wrong and defraud the plaintiff, stated and represented to plaintiff that said cause had been reversed and remanded, and urged that as a reason why plaintiff should compromise and settle the matter; that plaintiff, relying upon such statements and representations, was induced thereby to enter into a compromise and settlement of the suit, and he then and there did accept from the defendant the Texas Elevator and Compress Company the sum of \$10,000, and did for that consideration execute and deliver to said defendant a receipt in full against said claim; that, to more effectually consummate the fraud, and defeat plaintiff from securing relief against same, the defendant Chapman Bradford did, on, to wit, July 16, 1890, induce the plaintiff to execute and deliver to him a transfer of the claim and judgment, the said Bradford being then acting in the interest of the Texas Elevator and Compress Company, and the plaintiff, when he made said transfer, still believing that his said judgment had been reversed and his case remanded, but defendants still concealed from plaintiff the fact that same had been affirmed, that, at the time of the purported compromise and transfer of his claims, the same amounted to \$20,000, and defendant the Texas Elevator and Compress

Company and its sureties on appeal bond were amply solvent, and the full amount of said judgment could easily have been made by execution against them, and had plaintiff known or believed that the judgment had been affirmed, he would not have accepted in settlement less than the full amount of the same ; that, by reason of the fraud so practiced upon him by said defendants, plaintiff was induced to accept said \$10,000, and to release and relinquish all rights to an interest in said claim and judgment ; that he received no further consideration for said release and in settlement save said \$10,000 ; wherefore plaintiff prayed for judgment setting aside, annulling and holding for naught said purported settlement and compromise ; and that all receipts, releases or transfers to said Texas Elevator and Compress Company or to Chapman Bradford, executed by plaintiff, with reference thereto, be canceled and annulled ; and that the judgment be revived, reinstated, constituted and established as it existed at and before said purported settlement or compromise, with all the force, virtue, effect, rights and liens thereto appertaining or belonging ; and that said judgment then be credited as of the 8th day of July, 1890, with the said sum of \$10,000 ; and plaintiff prayed, in the alternative, for judgment against said defendants for his damages in the sum of \$10,000, and costs, etc.

The defendant Chapman Bradford answered by general demurrer and general denial. The defendants the Texas Elevator and Compress Company, C. F. Carter, Royal A. Ferris and W. White, after a general demurrer to said pleading of plaintiff, urged their special exceptions thereto : (1) Because it is nowhere alleged that plaintiff, in making his settlement and compromise of the suit mentioned by him, was deceived by any of the alleged representations which he charges were made to him by defendants ; and (2) because it appears from plaintiff's pleading that the means of knowledge and opportunities for intelligence in regard to

the disposition of the said case, as made by the Supreme Court, were equally open and available to all the parties; and plaintiff's own pleadings show that, when he made the transfer and settlement of the judgment, he acted upon his own means of knowledge, and was not deceived by the defendants. And, after a general denial, the said last-named defendants, further, by way of special answer, averred that at the time the judgment in favor of plaintiff, and against defendant the Texas Elevator and Compress Company, was rendered by the District Court of Dallas county, as stated by plaintiff, the firm of John T. Hardie & Co., of New Orleans, La., were then the owners of almost the entire stock of the Texas Elevator and Compress Company, which was defendant in said original suit; that, shortly after said judgment was rendered in said District Court, said John T. Hardie & Co. sold all of their interest in said the Texas Elevator and Compress Company, a corporation, to the defendants herein, C. F. Carter and W. White, and one F. C. Collier, who paid full value therefor, but first exacted from John T. Hardie & Co. that the latter should protect them from liability on account of said judgment, and said parties are still the owners of the stock of said Texas Elevator and Compress Company; and, in order to secure said purchasers from liability on account of said judgment, said John T. Hardie & Co. deposited with defendant Royal A. Ferris, in pledge and for the purpose of securing said purchasers from any liability on account of said judgment, twenty bonds, of \$1,000 each, of the Texas Elevator and Compress Company, numbered from one to twenty inclusive, and being all of the first mortgage bonds of said company, and worth \$20,000; said pledge and deposit thereof being made with the agreement that they should be held by the said Ferris as security, that said John T. Hardie & Co. should protect the Texas Elevator and Compress Company from any liability on account of said judgment, and also to induce the defendants C. F. Carter, Royal A. Ferris and

W. White to sign, as sureties, the *supersedeas* bond on appeal mentioned by plaintiff; and it was also agreed that said Ferris should hold said bonds in pledge and as security that John T. Hardie & Co. should protect and hold harmless the said sureties on said appeal bond from any liability on account of signing said bond; and, before defendants would sign said bond, they exacted of John T. Hardie & Co. that said bonds should be so pledged and deposited with said Ferris as indemnity against any liability, etc. The said defendants specially denied all the allegations of conspiracy and fraud charged against them by plaintiff, and alleged that the transfer and settlement of the judgment mentioned by plaintiff was made without their knowledge, and that said Bradford and said Randle were in no sense the agents of these defendants in such transaction; that after the plaintiff had assigned and transferred his said judgment to the said Bradford, and after same had been released of record, they, said defendants, permitted said John T. Hardie & Co. to withdraw from the possession of said Ferris all of the said bonds, and same were then delivered to said John T. Hardie & Co. by said Ferris, because these defendants believed that said judgment was in fact satisfied, and since that time they have no security whatever against liability on said bond and judgment should said judgment be reinstated and revived; that said bonds were released to John T. Hardie & Co. in good faith by these defendants, and without any knowledge whatever that plaintiff had any cause of complaint, or that he claimed anything for or on account of said judgment, and of its transfer and discharge; wherefore these defendants averred and pleaded an estoppel against plaintiff, and that, by reason of the foregoing facts, the plaintiff should be held by the court to abide by the voluntary settlement and transfer of the judgment, etc. The cause coming on to be heard on November 27, 1891, the general demurrer and first and second special exceptions of the defendants the Texas Elevator and Compress Company,

C. F. Carter, White and Ferris were presented to the court, and were overruled, to which ruling defendants then excepted; and a jury trial resulted in a verdict against the Texas Elevator and Compress Company, and for defendants Carter, White and Ferris. There was no finding by the jury as to the defendant Chapman Bradford. Upon this verdict judgment was entered, annulling the transfer and assignment of the former judgment by plaintiff to Bradford, and re-establishing and constituting same as affirmed by the Supreme Court, less a credit of \$10,000, paid as of July 8, 1890, and awarding all costs against the Texas Elevator and Compress Company. The elevator company alone appeals.

The conclusions of fact in support of the verdict and judgment are as follows: On May 18, 1887, appellee, T. B. Mitchell, obtained judgment in the District Court of Dallas county, Tex., against appellant for \$15,200, with eight per cent. interest, and costs. The Texas Elevator and Compress Company appealed to the Supreme Court. At that time, John T. Hardie & Co., of New Orleans, La., owned most of the stock in said elevator company. In order to make the appeal bond, the parties interested deposited with N. A. McMillan, cashier of the National Exchange Bank at Dallas, twenty of the first mortgage bonds of said elevator company in order to secure and indemnify C. F. Carter, W. White and Royal A. Ferris, who signed the appeal bond in said case, which was for about \$35,000. Said case was duly heard in the Supreme Court, and about June 25, 1890, the said cause was affirmed. On June 25, 1890, the Dallas Morning News reported that said cause had been reversed and remanded. On June 26, 1890, said Mitchell, who had been absent, returned to Dallas, and was informed by his friends that the case had been reversed and remanded, and was so reported in the newspapers. He inquired of one of his attorneys, and was informed that the mandate of the Supreme Court would be sent down in a short time. As

soon as the report of the case was made in the Dallas News, on June 25, 1890, Col. W. W. Leake, one of appellant's counsel, wrote to John T. Hardie & Co., informing them that the case was reversed and remanded, but a few days later he learned of the mistake in the report in the News, and again wrote to John T. Hardie & Co. that the case was affirmed. Chapman Bradford, of Dallas, was a nephew of John T. Hardie, and prior to this was agent and attorney for John T. Hardie & Co. By July 7, 1890, he had procured a copy of the opinion in the case, and knew the judgment was affirmed. On July 8, 1890, he procured F. L. Randle, a broker in Dallas, to go to Mitchell and buy the judgment for \$10,000, which at that time was about 50 cents on the dollar. The facts proved and the verdict and judgment thereon justify the conclusion, in support thereof, that Randle, in making the purchase, informed said Mitchell that the judgment had been reversed and remanded, and that said Mitchell, induced by this information, made the sale, which he would not have made had he known the real facts; that before closing the trade with Bradford, and while Bradford was writing the transfer, Mitchell asked him if there was anything new about the case, and he made no reply, but kept on writing. He knew that Mitchell was making the sale under the mistaken impression that the judgment was reversed and remanded, and, although he had in his possession at that time a copy of the opinion of the Supreme Court affirming the judgment, he did not reveal to Mitchell the real facts, and the broker who negotiated the purchase actually used it as a fact that the judgment was reversed and remanded. The transfer of the judgment was made to Chapman Bradford, July 8, 1890. In making payment for the transfer, Bradford drew a draft for the amount of \$10,275 on John T. Hardie & Co., through the bank of Flippen, Adone & Lobbit, which was placed to his credit (less exchange), and upon this he gave Mitchell a check for \$10,000. On July 16, 1890, Bradford exhibited

the transfer of the judgment to the clerk of the District Court of Dallas county, and procured him to note on the margin of the judgment that it had been transferred to him; and within a day or two he receipted the record in full, procured the clerk to make a certificate of that fact, which certificate he exhibited to Carter, White and Ferris; and they signed an order on McMillan to deliver to Bradford the twenty first mortgage bonds of the elevator company deposited to secure them as sureties on the *supersedeas* appeal bond. The first mortgage bonds were delivered to Bradford on the order, and were by him delivered to John T. Hardie & Co. The Texas Elevator and Compress Company was the beneficiary of the transfer made by Mitchell to Bradford, and although the transfer was in the name of Bradford, he had no beneficial interest in it, but was only acting as agent.

OPINION.

1. No complaint is made of the judgment by Bradford, White, Ferris or Carter, and the Texas Elevator and Compress Company is the only party to the appeal. The first assignment of error presented is as follows: "The court erred in overruling this defendant's general demurrer to plaintiff's second amended original petition, and also erred in overruling this defendant's special demurrer to said pleading, because said second amended original petition does not sufficiently allege that the plaintiff, in making his settlement and compromise of the suit mentioned by him, was deceived by any of the alleged representations, nor does it sufficiently aver that the means of knowledge and opportunities for intelligence in regard to the disposition of plaintiff's suit in the Supreme Court were not open and available to plaintiff as much as to the defendants; and said pleading shows that plaintiff, when he made the transfer and settlement of the judgment, acted upon his own means of knowledge, and was not deceived by this defendant; and in overruling said demurrers pointing out such

defects the court erred." This assignment presents a general demurrer and several different special demurrers under one assignment. The practice is questionable: *Paschal v. Owen*, 77 Tex. 583; but, waiving the question of practice, we think the pleading is amply sufficient. The plaintiff's second amended original petition declares upon a fraudulent conspiracy on the part of the defendants to cheat and defraud plaintiff, and that, through their agents, they represented to him that the judgment he had obtained against appellant had been reversed and remanded, when, in fact, it had been affirmed; that the representations were false; that they knew their falsity; and that plaintiff relied upon them, and was thereby induced to make the sale, which he would not have otherwise done. If the facts as set out in plaintiff's pleadings be true, it was the very "refinement of fraud." It is virtually assumed for appellant that, because appellee had already been misled and deceived by the publication in the newspapers to the effect that his case had been reversed, it was no harm to take advantage of his condition, by declaring that state of facts to be true, and stripping him of his property. The rule of decision in this state, as well as at common law, has always been broad and liberal in allowing the utmost freedom in negotiation, short of the perpetration of actual deceit and fraud. Upon the question of mistake of material facts, Mr. Story says: "Nor is it in every case where even a material fact is mistaken or unknown without any default of the parties that a court of equity will interpose. The fact may be unknown to both parties, or it may be known to one party, and unknown to the other. If it is unknown to one party, and known to the other, that will, in some cases, afford a valid ground for relief; as, for instance, where it operates as a surprise or fraud upon the ignorant party:" 1 Story, Eq. Jur., § 147. Mr. Kent says: "As a general rule, each party is bound, in every case, to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant

of them, and they be not open and naked, or equally within the reach of his observation:" 2 Kent. Comm., p. 482, § 39. The rule as laid down by Mr. Kent was adopted by our Supreme Court as early as *Mitchell v. Zimmerman*, 4 Tex. 79, and has ever since been adhered to: *Henderson v. Railway Co.*, 17 Tex. 560; *George v. Taylor*, 55 Tex. 102. See, also, *Keen v. James*, 39 N. J. Eq. 527; *Kerr, Fraud*, pp. 98, 100.

2. It is further contended that the petition is defective in failing to tender back the \$10,000 received by appellee. This contention might come with a better grace from Mr. Bradford, who claims to have paid it. He has not appealed from the judgment. If appellant furnished the money, it is fairly credited on the judgment as a payment. If appellant did not furnish the money, it certainly ought not to complain at the benefit conferred in getting a credit for that amount. The judgment was a valid lien upon appellant's property, and the credit has certainly extinguished the debt to that extent. We see no ground upon which appellant can complain of this: *Burns v. Ledbetter*, 54 Tex. 383; *French v. Grenet*, 57 Tex. 280.

3. Appellant's second assignment of error is as follows: "The court erred in overruling defendant's objections to the evidence of plaintiff to the effect that one F. L. Randle stated to him (plaintiff), while negotiating with plaintiff for a settlement and compromise of plaintiff's judgment, that he (Randle) was representing the Texas Elevator and Compress Company, because there was no testimony tending to show that said Randle was in any way connected with the said Texas Elevator and Compress Company (defendant), and his statements and conversations not in the presence of this defendant could not be heard against this defendant, because there had been no testimony tending to establish any conspiracy between this defendant, the Texas Elevator and Compress Company, and any other defendant in the case, which error of the court fully appears from the de-

fendant's bill of exceptions No. 1." The third and fourth assignments of error raise the same question in different forms. The propositions of law contended for by appellant are that agency cannot be proved by the declarations of the agent alone, and that, before the declarations of one co-conspirator can be used against another, the conspiracy, as a general rule, must be shown by other evidence, and cannot be proved by such declarations alone. These propositions are not without ample authority to support them, but we do not think they are applicable to this case. When F. L. Randle, as a broker, went to appellee to buy the judgment, he (appellee) testified that he did not claim to be acting for himself, but for another; that he stated to appellee who his principal was; that he claimed to be acting for the appellant, the Texas Elevator and Compress Company. This alone would not be sufficient to prove such agency; but it is a circumstance which, taken in connection with the other testimony—that, when John T. Hardie & Co. were notified of the disposition of the case, a copy of the opinion of the Supreme Court was promptly procured by Bradford, the agent of Hardie & Co., and the negotiation and purchase made with money furnished by a draft on them; that Bradford, after making the purchase, actually receipted the record, and released the judgment against appellant, without money and without price, so far as the record discloses; that the twenty first mortgage bonds, upon appellant's property, which had been deposited with McMillan, were speedily released and sent to John T. Hardie & Co., in New Orleans—tended to show that Randle was making the purchase for the elevator company. If Randle was not acting for the company, but for Bradford, as appellant claims, and he is not the owner of the judgment, and the testimony was illegally admitted, and his transfer illegally set aside, Bradford is not complaining, and it is difficult to see how appellant has been injured thereby, it having, as it claims, no community of interest with him. But the principle is well

settled that if a fraud was in fact perpetrated upon appellee by the parties making the negotiation, and the benefits of such fraud accepted by appellant with a knowledge of the fraudulent acts, such beneficiary cannot be heard to deny the agency: *Brown v. Bridges*, 70 Tex. 664, 665, 8 S. W. 502; *Mechem, Ag.*, §§ 148, 151. In any event, under the facts of this case, if Randle was appellant's agent, no harm could come to it from the declarations. If he was not its agent to make the contract, and the appellant has parted with no consideration, it cannot be heard to complain. Under the facts, the elevator company being the only party to this appeal, and not having paid out a dollar, according to its own theory, it is in no condition to complain of this ruling. The question of agency becomes an immaterial fact so far as the result of the case is concerned.

4. The fifth assignment of error is as follows: "The court erred in so much of its charge to the jury quoted as follows: 'If, from the evidence before you, you believe that the Elevator and Compress Company, by Chapman Bradford, sent one Randle to Mitchell to purchase this judgment, and you find and believe, at the time, that Bradford, representing said Compress Company, knew, at the time, that the information contained in the Dallas Morning News of June 25, 1890, was not true, but that, in fact, the Supreme Court of Texas had affirmed said cause, and that this fact was unknown to Mitchell, but that Randle urged as a reason for selling the judgment that it had been reversed by said Supreme Court, and, but for these representations, Mitchell would not have sold, and the sale and transfer was made under these circumstances, then, by your verdict, you should find for the plaintiff, against said Elevator and Compress Company,' because said charge assumes that there was legitimate evidence to show that Bradford represented the Texas Elevator and Compress Company in the purchase from plaintiff from his judgment, and because said charge assumes that the relation between Bradford and Mitchell in

that transaction was such as to impose upon Bradford a fiduciary relation, and a relation of trust and confidence towards him on the part of Mitchell, and that Mitchell had a right to rely upon representations made to him by Bradford and Randle." The only two points alleged against it are (1) that it assumes that there was legitimate evidence to show the agency of Bradford; and (2) that it assumes that there was a fiduciary relation between Bradford and Mitchell, giving the latter a right to rely upon the representations of the former. These positions are not believed to be sound. In the first place, we think there was legitimate evidence tending to show the agency of Bradford. In the second place, it is not necessary that there should be a fiduciary relation between the parties to a transaction before a court of equity will give relief against an actual fraud. It may be true that appellee did believe from the publication of the News, and from what his friends told him of such publication, that the case had been reversed; but if appellant, by its agents, took advantage of this fact, knowing the impression made upon Mitchell by such publication, knowing that he believed such to be the fact, but also knowing that this was not true, and, by fraudulent representations or fraudulent concealment of the facts when asked about them, induced appellee to make the sale, which he would not otherwise have done, such acts constituted, in law, a fraud, without regard to fiduciary relations. If the charge was not as full as appellant desired, additional charges should have been requested. Aside from this view, we think that a fair construction of the language of the charge leads to the conclusion that the court did not assume these particular facts to be true, but submitted them to the jury, as legitimate issues of fact to be determined by them. But, if it should be conceded that the court did assume that there was legitimate evidence to show that Bradford was the agent of appellant, as contended for in its objection to the charge, still, this being an immaterial issue in

the cause, it could not change the result, and would be harmless.

5. The seventh assignment is covered by the discussion of the points above.

6. The sixth assignment of error is as follows: "The court erred in refusing to permit defendant Texas Elevator and Compress Company to prove by W. White and C. F. Carter that the twenty first mortgage bonds of the original Texas Elevator and Compress Company had been deposited with the vendees of the stock of said company, after plaintiff had obtained his original judgment, to protect said vendees and the lands of said company from the lien of plaintiff's said judgment, which error of the court is fully disclosed in this defendant's bill of exceptions No. 3, herein filed, and which error was pointed out to the court by this defendant in the second ground of this defendant's motion for a new trial." (1) By reference to the bill of exceptions No. 3, it is shown that appellant offered to prove by White and Carter that, about the time the appeal bond was signed, John T. Hardie & Co. sold their stock in the Texas Elevator and Compress Company to C. F. Carter, F. C. Collier and W. White, and deposited with them, as indemnity against the judgment, twenty first mortgage bonds of said company, worth \$20,000. What they did with such bonds the bill of exceptions does not disclose. The relevancy of the evidence is not made apparent, either by the bill of exceptions or by the assignment. (2) Neither Carter, Collier nor White are parties to this appeal, and, if they were injured by not being allowed to prove the above alleged facts, they are making no complaint. So far as appellant is concerned, it is not claimed that it was a party to the above transaction, which was between stockholders, and in which the company had no part. The issue does not concern appellant, even if it was error. (3) The testimony was irrelevant and immaterial under the allegations in appellant's answer, which practically adopts the acts of Bradford in obtaining the transfer

and claiming a release by reason of the receipt of record filed by him. It cannot claim a release by reason of rights accruing to a part of its stockholders, individually; *a fortiori*, where the bill of exceptions fails to show what they did with the bonds: *Bank v. Sachtleben*, 67 Tex. 421, 3 S. W. 733; *Longley v. Stage Co.*, 23 Me. 39.

7. The ninth assignment is as follows: "The court erred in canceling and setting aside the assignment of the judgment by Mitchell to Bradford, because such judgment was outside of and unsupported by the verdict, because there was no finding by the jury for or against Bradford; and, as the right of this defendant to be released from plaintiff's original judgment was derived from Bradford, so long as the assignment of the judgment to Bradford was in force no decree could be rendered against this defendant canceling and setting aside the assignment and release of said original judgment." (1) Bradford is not a party to this appeal, and is not complaining of the judgment against him. If that judgment was rendered without any verdict, he alone can take advantage of it. (2) Even if this were error, it does not concern appellant. (3) Bradford, if only a formal party, need not necessarily be included in the verdict; and no recovery being asked or taken against him further than a cancellation of the transfer and the release which he claimed to have made, and in his pleadings practically disclaimed, the judgment was not erroneous: *Railway Co. v. James*, 23 Tex. 18, 10 S. W. 744; *Pearce v. Bell*, 21 Tex. 691.

We think the judgment is supported by the evidence, and that substantial justice has been reached. The judgment is affirmed.

A suppression of a material fact which one is bound in good faith to disclose is equivalent to a false representation: *Tyler v. Savage*, 143 U.S. 79. Mr. Justice STORY, *Story Eq. Juris.*, § 207, takes very much narrower ground than that taken by Chancellor Kent: 2 Kent Com. 482, quoted in the opinion, and limits the

obligation of disclosure to cases in which there are facts within the knowledge of one party and which the other party "has a right not merely in *foro conscientiæ* but *juris et de jure* to know." The doctrine in the principal case is, however, supported by the authority of decided cases. In *Law v. Grant*, 37 Wisc. 548, it was held that where a vendor knows that a vendee is buying upon the faith of a statement made by a third person, which statement the vendor knows to be untrue, he is bound to communicate the fact of its falsity; and in *Gottschalk v. Kircher*, 109 Mo. 170, a case resembling the present in some respects, it was held that an assignment of a judgment for a sum greatly less than its value would be regarded as having been procured by fraud, when the assignee knew of and concealed from the assignee facts, unknown to the latter, which rendered the judgment collectible, at least as to the far greater part of it, and prevented the discovery of the concealment by keeping the assignor on a false scent until the assignment was procured; and see *Sebastian May Co. v. Codd* (Md.), 26 Atl. 316. It has even been held that a mere refusal to answer any questions will not absolve the party to a contract from the duty of revealing that, the concealment of which, without such refusal, would have been fraudulent: *Torrey v. Buck*, 1 Green Ch. 366; *Stoner's Admr. v. Wood*, 26 N. J. Eq. 418. The rule laid down by Sir Frederick Pollock for the determination of the question when does a contract exist, when but one of the parties thereto has knowledge of a fact materially affecting the subject-matter of the contract, applies, it seems, in principle to cases like the above. Letting X represent such fact, the learned author says: "1. Does A intend to contract only on the supposition that X exists? which may be put in another way, thus: If A's attention were called to the possibility of his belief in the existence of X being erroneous, would he require the contract to be made conditional on the existence of X? 2. If so, does B know that A supposes X to exist? 3. If B knows this, does he also know that A intends to contract only on that supposition? If the answer to any one of these questions is in the negative, it seems there is a binding contract. But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that if this question be answered

in the affirmative, an affirmative answer to the third question will often follow by another irresistible inference:" Pollock, Contracts, 447.

Fraud—Preference of creditor—Husband and wife.

MURRAY ET AL. v. HEARD ET AL.

(Supreme Court of Alabama, May 16, 1894.)

The grantee of a deed made by an insolvent debtor, the consideration of which is an antecedent debt, has cast upon him, as against other creditors of the grantor, the burden of showing the *bona fides* of the transaction.

An insolvent or failing debtor may, in the payment of his debts, prefer one creditor above another, and the mere fact that a preferred creditor is the wife of the debtor does not avoid the preference, where the testimony shows the *bona fides* of the consideration, in discharge of which the preferential conveyance is made, and that the property is taken at a fair valuation.

Appeal from Chancery Court, Butler county.

On January 10, 1891, Murray, Dibbrell & Co. and O'Bryan Bros. filed a bill of complaint against George P. Heard, A. A. Heard and W. L. Tillman, in which the complainants alleged that they were creditors of said George P. Heard; that on the 5th day of January, 1891, the said George P. Heard conveyed to his wife, A. A. Heard, certain lands upon the recited consideration of \$1,100, in payment of an alleged antecedent debt due to her by the said George P. Heard; that the said George P. Heard also conveyed to W. L. Tillman certain other lands and personal property upon the recited consideration of \$4,084.58, in payment of an alleged antecedent debt. The bill averred that the considerations recited in the respective deeds were fictitious and simulated; that the property conveyed was greatly disproportionate to the debts, and that the conveyances were fraudulent and void. The prayer of the bill was that these conveyances be

declared fraudulent and void as to complainants, and that the property therein described and attempted to be conveyed be subjected to the debts of the complainants. Shortly after the filing of this bill, there were two other bills filed by the creditors of the said George P. Heard. Each of these bills was substantially a copy of the first, with the exception of the amounts claimed and the names of the complainants. The respondents answered and defended separately these three bills of complaint, and in their answers denied that said George P. Heard was indebted to either of the complainants at the time of the execution of the conveyances to A. A. Heard and W. L. Tillman, or at the time of the filing of the respective bills, and they affirmed in their answer the existence and validity of George P. Heard's indebtedness to each of the other respondents, the sufficiency of the consideration of each of the conveyances, and that no reservation of an interest in said property was reserved to the said George P. Heard, and that the conveyances were not executed for the purpose of hindering, delaying or defrauding his other creditors. The evidence in each of the cases was the same. The opinion renders it unnecessary to set out this evidence. The three causes were submitted together, and upon the final hearing, upon the pleadings and proof, it was decreed by FOSTER, Ch., that the complainants in each of the bills were not entitled to the relief prayed for, and each of the bills was dismissed. From the decrees of dismissal Murray, Dibbrell & Co. appealed and assigned the same as error.

Stallings & Wilinon, for appellants.

J. C. Richardson, for appellees.

COLEMAN, J.—The appellants, creditors of George P. Heard, filed the present bill in the Chancery Court, and sought to set aside and annul certain conveyances of land and a bill of sale executed by the debtor to Mrs. A. A. Heard and William L. Tillman, the former being the wife

and the latter the brother-in-law of the debtor. There were separate conveyances, and for separate property to each of the grantees. The proof shows that the claims of the complainants were *bona fide*, and in part were past due, before the execution of the several conveyances and bill of sale. The defense set up was that the property was sold and received in absolute payment of pre-existing debts. The fact that complainants' debts were owing prior to the date of the execution of the grant cast the burden of showing the *bona fides* of the consideration, and that the property was taken at its fair value, and no benefit reserved in any way to the grantor debtor, on defendants. In the examination of the testimony, introduced by the respondent, the relation of the grantees to the debtor is a fact to be considered in determining the *bona fides* of the transaction between them and the truth of their statements. We have examined the testimony with great care, and find from the testimony of disinterested parties that the property was sold at a price not less than its real value. The brother-in-law, Tillman, has established the *bona fides* and amount of his claim by the testimony of disinterested witnesses and by evidence which leaves no room to question its correctness. His claim alone, according to the great weight of the evidence, was a fair equivalent for the property conveyed and sold to both grantees. Mrs. A. A. Heard has established her claim by her own testimony and that of Tillman, her brother, and her husband, the defendant debtor. She has gone into details as to her resources, her means of obtaining the money she claims to have loaned her husband. She testifies as to her landed interest, where it is situated, the annual rents received from this source and by whom and when paid; also, as to her ownership of the livery stable, the evidence of such ownership and how long she has owned it, from whom obtained and how paid for. The complainants offered no evidence in rebuttal of the facts testified to by her and her brother in regard to her pecuniary abilities. This court

would be compelled to reject, without any reason save that she was the wife of the debtor, testimony which the complainants themselves did not pretend to meet, before we could conclude that she had not fully discharged the burden resting upon her. The law is well settled that an insolvent or failing debtor may, under proper conditions and limitations, prefer certain creditors in the payment of the debts due them. The proof brings the case fairly within the principles of law decided in the case of *Pollock v. Meyer* (Ala.), 11 South, 385, and the authorities there cited. Appellants' counsel have submitted no argument and filed no brief in the case in this court, but we have considered the questions raised by the assignment and there is no error in the record.

Affirmed.

In the absence of a statutory prohibition, a debtor may pay or secure the debt of one creditor rather than that of another. A mere preference of one creditor over others is not a fraud: *Hoge v. Campbell*, 78 Wisc. 572; *Sutton v. Davis*, 15 Col. 98; *Wallis v. Schneider*, 79 Tex. 479; *First Nat. Bank v. Ridenour*, 46 Kan. 707, 718; *Turner v. Iowa Nat. Bank*, 2 Wash. 192; *Voorhis v. Michaelis* (Kan.), 5 N. W. 592; *Bartley v. Mfg. Co.*, 32 Kan. 73; *Hays v. Dillon*, 125 Ind. 50; *Straight v. Roberts*, 126 Ib. 382; *Cary & Moen Co. v. McKee*, 40 Fed. Rep. 858; *Stockgrowers' Ass'n v. Newton*, 13 Col. 245; *Crow v. Beardley*, 68 Mo. 435; *Boldero v. London & Western Disc. Co.*, L. R. 5 Ex. 47; *Gladstone v. Padwick*, L. R. 6 Ex. 203; *Middleton v. Pollock*, 2 Ch. D. 108; *Ex p. Games*, 12 Ib. 314; *John V. Farwell Co. v. Wright*, 38 Neb. 445; *Jones v. Loree* (Neb.), 37 Neb. 816; *Hewitt v. Commercial Banking Co.* (Neb.), 59 N. W. 693; *Meyer v. Union Banking Co.* (Neb.), Ib. 696; *Huntley v. Kingman*, 152 U. S. 527; *Schram v. Taylor*, 51 Kan. 547; *N. B. Claflin Co. v. Rodenberg* (Ala.), 13 So. 272; *Dawson v. Flash* (Ala.), 12 So. 67; *Crawford v. Null*, 144 U. S. 585; *Windmuller v. Chapman*, 139 Ill. 163.

The preference is not rendered fraudulent by the fact that the preferred creditor is the intimate friend: *Johnson v. Jones*,

16 Col. 138; or a relative of the debtor, as the wife: *Leonard v. Smith*, 34 W. Va. 442; *Winfield Nat. Bank v. Croco*, 46 Kan. 629; *Laird v. Davidson*, 124 Ind. 412; *Tomlinson v. Matthews*, 98 Ill. 178; *Graves v. Davenport*, 50 Fed. Rep. 881; *Neighbor v. Hoblitzel* (Iowa), 51 N. W. 53; *Wadsworthville Poor School v. Bryson*, 34 So. Car. 401; *Highland v. Anderson*, 13 Ky. L. Rep. 710; *Brock v. Hudson County Nat. Bank*, 48 N. J. Eq. 615; *Garner v. Providence Second Nat. Bank*, 151 U. S. 420; *Schloss v. McGuire* (Ala.), 15 So. 275; *Murray v. Heard* (Ala.), 15 So. 565; *Bennett v. Bennett*, 37 W. Va. 396; *Blanks v. Klein*, 2 U. S. App. 363; *Nadal v. Britton*, 112 N. Car. 180; *Lieber v. Steffy* (Ariz.), 32 Pac. 261; *Armstrong v. Cook*, 95 Mich. 257; *Hicks v. McLachlan*, 94 Ib. 278; *Kilgore v. Stoner* (Ala.), 12 So. 68; *Williams v. Harris* (S. D.), 54 N. W. 926; mother: *Lloyd v. Williams*, 21 Pa. 327; father: *Snyder v. Jetton* (Ind.), 37 N. E. 143; *Barr v. Church*, 82 Wisc. 382; *Goodenow v. Friott* (Iowa), 57 N. W. 437; *Lindsley v. Van Cordlandt*, 67 Hun, 145; brother: *Straight v. Roberts*, *supra*; sister: *Gamble v. Harris*, 5 Del. Ch. 512; *Shaw v. Shaw* (Ky.), 24 S. W. 630; son: *Rindskoph v. Kuder*, 145 Ill. 607; *Zahn v. Smith*, 18 Atl. 865; *Brown's Appeal*, 86 Pa. 524; *Merchants Nat. Bank v. Sears* (Ky.), 20 S. W. 269; *Beloit Second Nat. Bank v. Merrill & H. Iron Works* (Wisc.), 54 N. W. 503; daughter: *Farwell v. Cunningham*, 86 Iowa, 67; *Bannister v. Phelps* (Wisc.), 51 N. W. 417; *Nelson v. Kinney* (Tenn.), 25 S. W. 100; and even where the daughter is a minor, if emancipated and there is a conveyance to her in consideration of services performed under contract: *Kain v. Laskin*, 131 N. Y. 300; father-in-law: *Stevens v. Breen*, 75 Wisc. 595; son-in-law: *Hawley v. Tesch* (Wisc.), 59 N. W. 670. It is immaterial how the preference, if in payment of or to secure an honest debt, is brought about. It may be by a direct delivery of goods, a conveyance of land or a sale of goods: *Wallis v. Schneider*, 79 Tex. 479; *State v. Hope*, 102 Mo. 400; *Davis v. McCarthy*, 52 Kan. 116; *Curran v. Olmstead* (Ala.), 14 So. 398; *Hillman v. Buck*, 55 Mo. App. 168; *Chipman v. Glennon*, 98 Ala. 263; (*contra* in Massachusetts under its Insolvent Law: *Chipman v. McClellan*, 34 N. E. 379); by a confession of judgment or by a bond and warrant to confess: *Appeal of Neal*, 129 Pa. 14; *Werner v. Zierfuss*, 162

Pa. 360; *Evans v. Kilgore*, 29 W. N. C. 279; *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430; *Young v. Clapp* (Ill.), 32 N. E. 187; *Newman v. Lyons*, 8 Manitoba, 271; and a preference may be given by a judgment even when there is a statute prohibiting preferences in assignments for benefit of creditors: *Victor v. Levy*, 72 Hun, 263; *Landon v. Martin*, 79 Ib. 229; *Kellogg v. Thrupp* (Col.), 36 Pac. 447; or by a mortgage, real or, in those states where chattel mortgages are recognized, chattel: *Whitfield v. Stiles*, 57 Mich. 410; *Hoge v. Campbell*, *supra*; *Turner v. Iowa Nat. Bank*, *supra*; *Flemington Nat. Bank*, 50 N. J. Eq. 244, 486; *Brown v. F. & M. Banking Co.*, 36 Neb. 434; *Marquam v. Sengfelder* (Or.), 32 Pac. 676; *Farwell v. Cunningham* (Iowa), 52 N. W. 1126; *P. & O. Co. v. Spencer* (Kan.), 33 Pac. 362; *Samuel v. Kittinger* (Wash.), Ib. 509; *Morgan v. Worden* (Ind.), 32 N. W. 783; *Costello v. Chamberlain*, 36 Neb. 45; *F. & T. Bank v. Haney* (Ind.), 56 N. W. 61; *Denver First Nat. Bank v. Lowry*, 36 Neb. 290; *Shroeder v. Babbitt* (Mo.), 18 S. W. 1093; *Warren v. His Creditors*, 3 Wash. 48; *Meier v. Flinsback* (Ky.) 24 S. W. 235; *Ross v. Miner* (Mich.), 59 N. W. 425; *Schloss v. Solomon*, 97 Mich. 526; *Abiline Nat. Bank v. Naill*, 52 Kan. 211; *Marquise v. Felsenthal*, 58 Ark. 293; *Byrd v. Perry* (Tex. Civ. App.), 26 S. W. 749; or by an assignment; and where there is a statute avoiding preferences in assignments, the assignments will be good and will be carried into effect, the preferences being disregarded: *Cross v. Beardley*, *supra*. A preference is not avoided as fraudulent by the fact that it is given *pendente lite*: *Thomas v. Johnson* (Ind.), 36 N. E. 92; after a verdict obtained upon another claim: *Straight v. Roberts*, *supra*; or on the eve of an attachment: *Warner Glove Co. v. Jennings*, 58 Conn. 74; just before a trial for a tort for which there is a pecuniary penalty: *Leonard v. Smith*, 34 W. Va. 442; or even after bankruptcy proceedings have been begun: *Talcott v. Harden*, 119 N. Y. 536; there are, however, in some states, statutes avoiding preferences given in view of insolvency, or of assignments. But a preference may be fraudulent and may be shown to be so by the circumstances attending it, or by intrinsic evidence: *Devrees v. Phillips*, 63 N. Car. 53; *Shelley v. Booth*, 73 Mo. 74; *Smith v. Schwed*, 9 Fed. Rep. 483; a familiar example of this is where there is a combination by the preferred creditors

and the debtor to prevent a fair competition at a sale: *Drury v. Cross*, 7 Wall. 299; *James v. R. R. Co.*, 6 Ib. 752; and evidence of fraud may be found where the preference takes the form of a sale of goods, at a price in excess of the creditor's claim and the payment of the balance in cash or by note: *Carter v. Coleman*, 82 Ala. 177; *Seger v. Thomas*, 107 Mo. 635; but the mere giving of a note for the excess by the creditor, where he undertakes to apply the excess to the payment of the claim of a third person against the debtor does not show fraud: *Tennent S. & E. Shoe Co. v. Partridge*, 82 Tex. 329; and where, on the same day that land is conveyed in part payment of a debt, the debtor, by a subsequent independent transaction, though on the same day, sells merchandise to the vendee to settle the rest of the debt and receives a small amount in cash to balance the account, the first transaction will not be rendered fraudulent by the second: *Buford v. Shannon*, 95 Ala. 205. Fraud may be inferred where the instrument of transfer does not truly state the circumstances: *Alabama Life Ins. & T. Co. v. Peltway*, 24 Ala. 554; where a security is in excess of the liability: *Menzesheimer v. Kennedy*, 75 Wisc. 411; *Thompson v. Richardson Drug Co. (Neb.)*, 50 N. W. 948; *Henry v. Harrell*, 57 Ark. 569; *Kellogg v. Clyne*, 54 Fed. Rep. 645; *Ferris v. McQueen*, 94 Mich. 367; the same applies to the case of sales: *Van Rzaalts v. Harrington*, 101 Mo. 602; but in such case it is said fraud will not be inferred unless the value of the article sold is grossly in excess of the debt: *Chipman v. Glennon*, 98 Ala. 263; where a deed is designedly or by agreement withheld from record: *Stock Growers' Bank v. Newton*, 13 Col. 245; *Dickson v. McLarney (Ala.)*, 12 So. 398; *Goll & F. Co. v. Miller*, 87 Iowa, 425; *Falker v. Linehan (Iowa)*, 55 N. W. 503; but a mere failure to record does not render a deed presumptuously fraudulent: *Beloit Second Nat. Bank v. Merrell & H. Iron Works, supra*; *Buford v. Shannon, supra*; *Burrows v. Traut (Va.)*, 14 S. E. 845; in *Flemington Nat. Bank v. Jones*, 50 N. J. Eq. 244, 468, it was held that merely withholding from record a mortgage for full consideration, lest it might injure the credit of the mortgagee, was not evidence of fraud, but in *Central National Bank v. Daar (Mo.)*, 18 S. W. 836, such a withholding, when in pursuance of an agreement, was held to be construct-

ively fraudulent, as against debts newly created and old ones renewed in reliance on the outward evidence of solvency thus maintained. Fraud may be inferred when there is a secret trust for the debtor: *Thompson v. Furr*, 57 Miss. 478; *Clements v. Cozart*, 109 N. Car. 173; when a deed absolute on its face is really a mortgage: *Beidler v. Bague*, 135 Ill. 549; but the mere fact that the creditor purchasing property is willing to reconvey when his debt is paid will not render the sale to him fraudulent: *Cary-Halidy Lumber Co. v. Cain* (Miss.), 13 So. 239. Many other circumstances give rise to a presumption of fraud which, however, as a preference can be set aside only for actual fraud, or at least for a neglect which so far affects the action of another as to mislead him to his injury with like effect as would be produced by a fraud, is rebuttable. To work the avoidance of a preference the creditor must be a partaker in the fraud. A creditor has a right to secure his claim, although he know that the effect of paying him will be to prevent the payment of other creditors: *Angell v. Packard*, 61 Mich. 561; *Hopkins v. Beebe*, 26 Pa. 85; *Bliss v. Conch*, 46 Kan. 400; *Chapman v. Windmuller*, 129 Ill. 163; *Lloyd v. Williams*, 21 Pa. 327; *Brown's Appeal*, 86 Ib. 524; *Crawford v. Neal*, 144 U. S. 585; *Denver First Nat. Bank v. Lowry*, *supra*; *Bates v. Vandiver* (Ala.), 14 So. 631; even if the payment be by a transfer of all the debtor's property: *Furth v. Snell*, 6 Wash. 542; *Hasie v. Connor*, 53 Kan. 713; a creditor may even accept a preference with knowledge that the object of the debtor is to defeat and delay other creditors, provided he do not himself share in the fraud, but merely seeks to obtain payment of what is honestly due him: *Gray v. St. John*, 35 Ill. 222; *Dudley v. Danforth*, 61 N. Y. 626; *Lead Co. v. Haas*, 73 Iowa, 399; *Stewart v. Bank*, 76 Ib. 571; *Manufacturing Co. v. Maslin*, 75 Ib. 112; *Sabin v. Columbia River L. & T. Co.*, 25 Oreg. 15; *Durand Organ & P. Co. v. Bowman* (Or.), 35 Pac. 848; *Johnston v. Dunn* (N. J. Eq.), 29 Atl. 361; *Rider v. Hunt*, 6 Tex. Civ. App. 238; *Kraus v. Haas*, Ib. 665.

Laches—Specific performance—Practice—Entry of judgment in wrong book—Appeal.

WOLF v. GREAT FALLS WATER-POWER AND TOWN SITE COMPANY AND OTHERS.

(Supreme Court of Montana, October 23, 1894.)

Laches of plaintiff may act as a bar to the enforcement of specific performance of a contract although the statutory period of limitation has not elapsed.

Where a vendee does not bring suit for the specific performance of a contract of sale of a town lot until three and a half years after the vendor has refused to carry out his part of the contract and taken possession of the lot which was the subject thereof, such delay, if unexplained, is such laches as will bar the vendee's right to relief by way of a decree for specific performance.

When a judgment is given by a court, the fact that, by an error of the clerk, it is entered in the wrong book will not render the judgment so far void as to require the dismissal of an appeal therefrom, and *semble* such judgment is valid as between the parties.

When a court amends a judgment on motion of the defendant and denies a new trial, an appeal by the defendant from the original judgment and from the denial of the new trial will not be dismissed on the ground that it should have been from the amended judgment, as the appeal from the order denying the new trial brings up the entire case.

Appeal from District Court, Cascade county.

This was an action brought by Jeremiah Wolf against The Great Falls Water-Power and Town Site Company and others to enforce specific performance of a contract of sale of land.

The case was heard by BENTON, J., without a jury.

On the hearing of the cause the facts appeared as follows:

On the 22d day of January, 1887, the plaintiff and James J. Hill and Conrad Gotzian, and their wives, entered into the following agreement: "Articles of agreement made this 22d day of January, in the year of our Lord one thousand eight hundred and eighty-seven, between James J. Hill and Mary T. Hill, his wife, Conrad Gotzian and Caroline Got-

zian, his wife, by Charles H. Benedict, their attorney-in-fact, all of the city of St. Paul, county of Ramsey, and state of Minnesota, all parties of the first part, and Jeremiah Wolf, of Great Falls, county of Choteau, territory of Montana, party of the second part, witnesseth, that the said parties of the first part hereby covenant and agree that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned, on his part to be made and performed, the parties of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrance whatever, by a good and sufficient warranty deed, the following lot, piece or parcel of ground, situate, lying and being in the town of Great Falls, in the county of Choteau, territory of Montana, and more particularly described according to the plat thereof on file in the office of the recorder in and for said Choteau county, as follows, to wit: Lot one (1) in block four hundred and eleven (411). It is hereby mutually understood and agreed that the above premises are sold to said second party for improvements, and the said party of the second part agrees and obligates himself, heirs and assigns, that he or they will, on or before the first day of August, 1887, build and construct a frame building, of the value of not less than five hundred dollars (\$500), and that all improvements placed on said premises shall remain thereon, and shall not be removed until final payment of the consideration hereinafter named. And the said party of the second part, in consideration of the premises, hereby covenants and agrees to pay to the said parties of the first part the sum of three hundred and fifty dollars (\$350), lawful money of the United States, in the manner following: Eighty-seven and 50/100 dollars (\$87.50) on the execution of this contract; eighty-seven and 50/100 dollars (\$87.50) on the 22d day of April, 1887; eighty-seven and 50/100 dollars (\$87.50) on the 22d day of July, 1887; eighty-seven and 50/100 dollars (\$87.50) on the 22d day of October, 1887—with

interest at the rate of ten per cent. per annum, payable semi-annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land subsequent to the year 1886. And in case of the failure of the said party of the second part to make either of the payments, or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract; and such payment shall be retained by said parties of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors and administrators and assigns of the respective parties. In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written. James J. Hill and Mary T. Hill, his wife, by their Attorney-in-Fact, Charles H. Benedict. Conrad Gotzian and Caroline Gotzian, his wife, by their Attorney-in-Fact, Charles H. Benedict. Jeremiah Wolf. Signed, sealed and delivered in the presence of Eugene P. Hickey, William A. Stephens." Afterwards the lot in controversy, with a large tract of other lands, was sold to the defendant company, which assumed to carry out and perform the above agreement with the plaintiff. The plaintiff made but one payment on the lot in controversy during the time fixed for the payments thereof, on said agreement; he failed to pay the taxes thereon before commencing this suit, amounting to \$60, which the defendant company paid; he failed to complete the house on the lot, according to the terms of the agreement, but, instead, erected a house, which he did not complete, of the value of about \$330. The plaintiff entered upon

the premises in controversy at the time of the execution of said agreement, and occupied them until September or October of the same year, when he moved to his ranch.

During the currency of the contract the plaintiff borrowed \$125 from a bank, giving his note therefor. Paris Gibson, vice-president of the defendant company, became surety for the loan and took as his indemnity an assignment of plaintiff's contract above set forth. This \$125 plaintiff used in building his house. The rents fell due in July and a few weeks after it had fallen due, plaintiff called at the bank, ascertained the amount due, and informed the banker that he would return the next day and pay it. On coming back the next day, he learned that Gibson had taken up the note and taken away the contract. Plaintiff called on Gibson, and offered to pay him the amount due on the note, having borrowed money for that purpose, and afterwards offered to pay to him the amount due on the note and on the contract. Gibson did not accept either offer. The plaintiff, on the 22d day of October, 1887, tendered the residue of the purchase-money, and interest, which he had failed to pay at the times specified therefor in said agreement, which the defendant company refused to accept. After the plaintiff left the premises, the defendant company took possession, finished the house which plaintiff erected thereon, fenced in the same, and planted trees thereon, and has ever since held the possession thereof, declaring said agreement forfeited. On the 29th day of April, 1891, the plaintiff commenced this suit for a specific performance of the contract of sale of the said lot in accordance with the terms of said agreement. The court made many findings of fact, including the facts set out above, among other findings the following: "(16) That at the time of entering into the contract for the sale of the lot in controversy the vendors, Hill and Gotzian, were the owners of a large amount of land in the neighborhood of said lot, which they had platted, and a part of which, being six in every fourteen lots, they were engaged in selling on

contracts similar to the one made with plaintiff. (17) That the object and purpose of such vendors in such contract, requiring the purchaser to erect a building, was to secure an increase in the value of the property contiguous thereto. (18) That the plaintiff knew at the time of entering into the contract herein of the ownership by the vendors of the neighboring property. (19) That the erection of a building upon the lot in controversy would tend to advance the market value of the neighboring property owned by the vendors. (20) That, at the time such contract was declared forfeited by the defendant, Paris Gibson, the building erected upon such lot by the plaintiff was incomplete, in this: that it was without siding or corner boards, and that such building was the only improvement made thereon by the plaintiff." The court, upon the findings of fact, rendered judgment for the plaintiff, for specific performance, upon his paying to the defendants the sums due them, according to the terms of said agreement. The defendants filed their motion for a new trial. This was denied, and from the order of the court refusing a new trial, as well as the judgment, this appeal was taken.

A. J. Shores, for appellants.

E. L. Bishop, for respondent.

PEMBERTON, C. J. (after stating the facts).—Upon the filing of the record of the case in this court, the respondent moved this court to dismiss the appeal, upon the ground that it appeared that the judgment of the court was not entered in the proper book. It appears that the clerk of the lower court kept a book labeled "Judgment by the Court," kept for the sole purpose of entering judgments by the court, and that the judgment in this case was not entered in this book, but it was entered in the "Minute Book" of the court. It also appears from the record of the case that the court on the 17th day of October, 1891, made and filed its findings and decision and judgment; that, on the 27th day of Octo-

ber, the defendant filed its notice of intention to move for a new trial; that thereafter, on the 4th day of November, defendant excepted to the findings of the court, and moved the court to correct certain defects therein; that on the 11th day of November the court made and filed an amended finding, decision and judgment, giving the defendant judgment for \$75.30 more than by the original findings and judgment. As the appeal is from the original judgment, the respondent contends it should be dismissed. If this appeal were from the judgment alone, this last might be a serious question. But the appeal is also taken from the order of the court denying appellant's motion for a new trial, and, as this appeal brings the whole case here, we do not think it should be dismissed for the reasons assigned by respondent. It appears also that the judgment of the court was rendered and entered, but entered in the "Minute Book," instead of the book labeled "Judgment by the Court." We do not think the judgment was invalid, especially between these parties, on that account, or that no appeal would lie therefrom.

There are a great many assignments of error in this record. The appellant contends and urges that the evidence shows that time was of the essence of the contract, and that the evidence shows that the plaintiff failed to comply with its terms in many material particulars, and has shown no excuse for not complying, and is therefore not entitled to specific performance. The court found that time was not of the essence of the contract. Whether the court erred in this finding or not; whether time was of the essence of the contract, as shown by the evidence and circumstances surrounding the case—we do not deem it necessary to decide in determining this case, while we confess that many of the facts and circumstances go far to support the theory that time was considered as of the essence of the contract by the parties at the time of its execution. At least, we think it cannot be insisted, under all the facts, and cir-

cumstances, that time was not material. As we view it, the vital question in the case is this: Was the plaintiff guilty of such laches, under all the facts and circumstances, after being notified by the defendant company that it would not fulfill its part of the contract, in bringing his suit, as to debar him of equitable relief? "Specific performance is not an absolute right. It rests in judicial discretion, exercised according to the principles of equity, and with reference to the facts of the case:" 4 Gen. Dig. U. S. 1710, and authorities cited. See, also, 2 Beach, Mod. Eq. Jur., § 566, and authorities cited. In *Knox v. Spratt* (Fla.), 6 South. 924, the court says: "The bill shows no reason for this long delay. Although time is not of the essence of the contract, yet if the complainant is not active and diligent in the assertion of his claim, and permits an unreasonable time to elapse, it will be presumed that he has acquiesced, and has abandoned any equitable right he might have had to enforce the contract. In the case under consideration the complainant waited two years and seven months, and he shows no reason why he delayed so long to file his bill. In *Watson v. Reid*, 1 Russ. & M. 236, the plaintiff, who was the vendor, did not file his bill for specific performance until about one year afterwards. The bill was dismissed on one ground that the plaintiff had unreasonably delayed filing it. In the case of *Gentry v. Rogers*, 40 Ala. 442, the plaintiff, though notified two years before the time for performance that the defendant would not perform the contract, waited nine months after the time when the contract should have been performed before filing his bill. In such cases, though time be not of the essence of the contract, a court of equity will not allow of a delay which would enable a party to take advantage of the turn of the market, and have the contract performed only in case it suits his interest." In *Delavan v. Duncan*, 49 N. Y. 485, the court say: "The contract was made November 6, 1862, for the sale of a house and lot in the city of New York for the price of \$5,500, to

be paid on the 15th of the same month, or as soon thereafter as the title could be searched, not to exceed thirty days. The judge finds as facts that early in December, 1862, about twenty days after making the agreement, the title to the property having been searched, the plaintiff said to the defendant that there were judgments recorded against him (describing such judgments), and requested him to have said liens removed, and stated that he was then ready to fulfill his agreement; that defendant said he could not or would not remove the liens. The action was not commenced until August, 1866. The inquiry is whether, upon these facts, the plaintiff was entitled to judgment for specific performance, and, if not, whether the evidence authorized the finding of such additional facts as would entitle him to such judgment. Fry on Specific Performance, § 730, a work of acknowledged authority, says: 'The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by filing a bill, or, lastly, in not diligently prosecuting his suit, when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.' Section 731 refers to the cases in which the doctrine was established. Section 732 says: 'The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff, either in executing his part of the contract, or in applying to the court, will debar him from relief.' 'A party cannot call upon a court of equity for specific performance,' said Lord ALVANLEY, 'unless he has shown himself ready, desirous, prompt and eager;' or, to use the language of Lord CRANWORTH, 'specific performance is relief which this court

will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit.' The cases cited by the author fully sustain his conclusions. See, also, *Marquis of Hertford v. Boore*, 5 Ves. 719, and cases cited note b, page 720; 1 Story, Eq. Jur., § 771, following to 781. In *Taylor v. Longworth*, 14 Pet. 172, Judge STORY, in giving the opinion of the court, at page 175, says: 'Relief will be given to a party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay and apparent omission of his duty.' " In *Gentry v. Rogers*, 40 Ala. 442, in a case very similar to the one at bar, the court say: " But there is another consideration which militates against the case of complainant. If one of two parties concerned in a contract respecting lands gives the other notice that he does not hold himself bound to perform, and will not perform, the contract between them, and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law: 2 *White & T. Lead. Cas. Eq.*, note to *Seton v. Slade*, pt. 2, p. 516; *Guest v. Homfray*, 5 Ves. 818; *Heaphy v. Hill*, 2 Sim. & S. 29; *Watson v. Reid*, 1 Russ. & M. 236; *Walker v. Jeffreys*, 1 Hare, 341. Not deciding the question whether the rule thus laid down had application to the case of complainant before the time fixed for the complete performance of the contract, yet, with distinct and emphatic notice that the defendant would not hold himself bound to perform the contract between them, given two years before the period fixed

for performance, he permitted about nine months to elapse from the latter period before he filed his bill to enforce performance; and this delay on his part is not accounted for, but left wholly unexplained. In *Watson v. Reid*, 1 Russ. & M. 236, the plaintiff, the vendor, having notice from the purchaser that the latter abandoned his contract, did not file his bill for specific performance until about one year afterwards, and the bill was dismissed on the sole ground of unreasonable delay in filing it. In such cases, though time be not of the essence of the contract, a court of equity will not allow of a delay which would enable a party to take advantage of the turn of the market, and have the contract performed only in case it suits his interest. The complainant in the case before us, by the delay in filing his bill, and by his failure to perform the acts required of him by the contract, did not evince that promptness and eagerness for a performance required at his hands to entitle him to invoke the urgent powers of a court of chancery to compel performance." In *Railroad v. Bartlett*, 10 Gray, 384, in a case involving the law of laches, the court say: "The contract for the sale of the land was made in 1844. The plaintiffs performed their part of the contract on the 29th of May of the same year, and the defendants then distinctly and absolutely refused to perform it on their part. No bill was filed for more than three years after the final refusal of the defendants to perform the contract, and this long delay in applying for the enforcement of the contract is left by the plaintiffs entirely unexplained. These facts, of themselves, would make us hesitate to give the plaintiffs the equitable relief which they seek: *Walker v. Jeffreys*, 1 Hare, 348, and cases cited; *Rogers v. Saunders*, 16 Me. 92. But there are other circumstances which tend to show that it would be inequitable to grant the relief asked for. The fact that the land which was the subject of the contract had greatly increased in value after the refusal to perform the contract, and before the filing of this bill, is entitled to

some weight: *Holt v. Rogers*, 8 Pet. 434. . . . Having thus, by their acts and laches for three years, induced the other party to suppose that they have abandoned this contract, it is too late to apply to this court to enforce it." In this case it will be observed that, although the plaintiff had promptly performed his part of the contract of sale, the court refused specific performance on account of the failure to bring suit therefor for the period of three years. In *Waterman on the Specific Performance of Contracts* (§ 473) the rule is thus stated: "The doctrine is well settled that great delay of either party, unexplained, in performing the contract, or when he claims specific performance in filing his bill, or in prosecuting his suit after the bill is filed, constitutes such laches as to forbid the interference of a court of equity, and to amount to an abandonment of the contract on his part." See, also, cases cited in note. Mr. Pomeroy, in his work on *Equity Jurisprudence* (vol. 3, § 1408), states the doctrine thus: "Although time is not ordinarily essential, yet it is, as a general rule, material. In order that a default may not defeat a party's remedy, the delay which occasioned it must be explained and accounted for. The doctrine is fundamental that a party seeking the remedy of specific performance, and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been 'ready, desirous, prompt and eager.'"

In the case at bar the plaintiff not only failed, as the evidence shows, to strictly comply with his part of the contract of sale, although he had ample reason to presume, from the feeling existing between the parties in relation to the matter, that a strict compliance would be required, but after being notified by the defendant company that it would not perform its part of the contract, after his tender of the purchase price of the lot was refused, and after the defendant company had re-entered and taken possession of the premises in controversy, he waited for more than three years before commencing his suit for specific performance. This

delay is not explained, or in any way attempted to be explained or excused. In fact, it seems that no excuse for this delay existed. The plaintiff, in his testimony, uses this language: "I had several thousand dollars last fall, and had at all times the ability to get money." The court finds that the object of the vendors in said contract, in requiring plaintiff to erect such a building on the lot, was to enhance the value of the property contiguous thereto, owned by defendant; that the erection of such a building thereon would have such effect, and that plaintiff was aware of these facts. The lot in controversy is situate in the city of Great Falls. At the time the contract was sought to be enforced, Great Falls was a small, struggling village. At the time of the commencement of this suit—more than three years after the expiration of the contract—it had grown to be a flourishing young city. Real estate had vastly increased in value, and its population had grown from hundreds into thousands. The circumstances and surroundings of the parties were different at the commencement of the suit from what they were at the date fixed for the completion of the contract sued on. Could the plaintiff lie by and wait for three years to see whether his contract was a good one, and, if so, ask a court of equity to enforce it, and, if a bad one, ignore and renounce it? We think not. The doctrine involved in this branch of the case is very elaborately discussed in *Green v. Covillaud*, 10 Cal. 317; and see authorities cited in this case. In the case just cited the court say: "In California, where such rapid and sudden fluctuations in the affairs and fortunes of men occurred as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element of past contracts, should be measured by the standards which obtain in old and settled states, where everything is comparatively stable and permanent; where capital is abundant, titles ascertained and interest is low. The peculiar circumstances, showing the value of punctuality here, call for a correspond-

ing rule, whereby the courts should exact it; and we conceive that it would be as unjust as impolitic and demoralizing to make new contracts for parties, by extending time they never intended to give, for it would be to encourage violation of engagements, and foster a spirit of reckless speculation."

We think it the well-settled doctrine that a party suing for a specific performance of contract, in a court of equity, must show that he has been "ready, desirous, prompt and eager" in complying with his part of the contract, or in filing his bill and prosecuting his suit for relief, in case of failure or refusal to fulfill on the part of his adversary, or show good and sufficient reason for his delay in so doing. In this case the plaintiff has not done so. In failing to do so, we think the plaintiff has been guilty of such laches as to debar him of the right to the relief sought. But it is contended that the statute of limitations controls in such cases, and that as a consequence the plaintiff would not be guilty of fatal laches, if he has brought this suit within the time prescribed by the statute of limitations. In *Beach on Modern Equity Jurisprudence* (vol. 1, § 20), the rule is thus stated: "Ordinarily courts of equity adopt the time fixed by the statute of limitations in analogous cases as the period at the end of which they will conclude recovery in equity. And it is said that courts of equity act not so much in analogy as in obedience to statutes of limitation of legal actions, because, where the legal remedy is barred, the spirit of the statute bars the equitable remedy also. Though, on the equity side of the United States courts, the statute of limitations cannot be pleaded, the court may look to such statute for analogies in applying the doctrine of laches. But the rule that the statute furnishes an analogy is not inflexible, and its application will always depend upon the particular circumstances of the case. In some of the states there are statutes of limitation applicable to equitable actions, but it is held that the period of limitation of equitable actions, fixed by the statute, is not, where a purely

equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or preclude the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period fixed by the statute has not elapsed since the cause of action accrued." See, also, cases cited. In *Delavan v. Duncan*, 49 N. Y. 488, the court say: "Under such circumstances the plaintiff had no equitable right to watch and wait during the period of the statute of limitations to avail himself of the benefit of the contract, if advantageous to him, but absolved therefrom if otherwise." In *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27, this question is fully discussed. This case was decided in 1890, and the court, in a unanimous opinion, say: "Courts of equity, it has been said, act not so much in analogy to as in obedience to statutes of limitation of legal actions, because where the legal remedy is barred the spirit of the statute bars the equitable remedy also. In the present case the cause of action for the cancellation of the bonds was not barred by the ten-years' statute applicable to equitable actions. But a period of nine years had elapsed after the bonds were issued, before the commencement of the action. But we apprehend that the period of limitation of equitable actions, fixed by the statute, is not where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued. The ten years' limitation was primarily designed to shield defendants: *Railroad Co. v. Dudley*, 14 N. Y. 352. And it must be true that a court, in the exercise of its equitable jurisdiction, could not entertain or enforce a cause of action barred by the statute, and not within any exception, acting upon any general equitable considerations. But in enforcing purely equitable remedies,

depending upon general equitable principles, unreasonable and inexcusable delay is an element in the plaintiff's case, which a court of equity always takes into consideration in exercising its discretion to grant or refuse relief, and is not a mere collateral incident. Where there is a remedy at law, whereby the plaintiff can prosecute or defend his legal right, the refusal of relief leaves the parties where they were. If there are special circumstances which may change the situation of the plaintiff to his injury, unless the equitable remedy is interposed, this fact may be considered. But the right of the court to deny relief upon equitable grounds, for long delay, although short of the statute period of limitation, is in the nature of a defense, and is not, we think, taken away by the statute. There may be a well-founded distinction between the case of an application for an equitable remedy in aid of or to enforce a legal right not barred by the statute, and the case where an exclusively equitable remedy is sought, such as to restrain proceedings at law, or, upon the principle *quia timet*, to deprive an adversary of the muniment of his alleged legal right, which he inequitably retains. In cases of the latter class, long delay or acquiescence, although short of the statute period for the limitation of equitable actions, may be a ground for refusing relief: Pom. Eq. Jur., § 817. The cancellation of securities is a purely equitable remedy, and cannot be claimed as an absolute right, nor is it applied for or awarded in aid of a legal right or title. We conclude, therefore, that it was within the power of the court to dismiss the complaint, so far as relief was sought, for a cancellation of the bonds, on the ground of delay in bringing the action. The circumstances justified the conclusion on this branch of the case." See, also, *Reynolds v. Sumner*, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, and note, with authorities cited therein.

It may be said that we have the Code practice, in which actions of law and equity are merged; that we have but

one form of action, either in law or equity. But does it follow, as a consequence, that the principles of equity jurisprudence, so long and everywhere in vogue, are abrogated? Is the rule that a party seeking the interference of a court of equity in the enforcement of a contract must show himself "ready, desirous, prompt and eager," which has become a maxim of equity jurisprudence, abrogated by the adoption of the Code practice, the merging of law and equity into one tribunal, and providing for but one form of actions in law and equity? Shall it be said in this state that a party shows himself to be sufficiently "ready, desirous, prompt and eager," provided that, in strictly equitable cases, like the one at bar, he brings his suit within the period prescribed by the statute of limitations? And, if he brings his suit within the statutory period, will it be said that he is not, and cannot be, guilty of such laches as will debar his right to relief in strictly equity cases? New York is a Code state. Her courts do not so hold, as will be seen by the cases quoted above. Nor do any of the authorities that we have been able to examine so hold. We do not think the position tenable: *Wat. Spec. Perf.*, p. 628; *Hall v. Russell*, 3 *Sawy.* 506, *Fed. Cas. No.* 5943.

In the consideration of this case, we have deemed it unnecessary to treat as important the acts of defendant or the plaintiff occurring prior to the alleged accruing of his right of action, although the record and findings show that he failed to comply therewith in many important respects. We have confined the consideration to the question as to whether the plaintiff was guilty of inexcusable laches in commencing his suit for specific performance after he was ousted from the possession of the real estate in question, and knew that the defendant would not comply with the contract of sale thereof unless compelled so to do. The plaintiff, as the record shows, and as he admits in his testimony, waited for three and a half years after his cause of action accrued, without any excuse, before he instituted this

suit. He offers no excuse for this delay. He testifies that he was able at all times to obtain money so to do if he had so desired. During all this unexplained and unexcused delay, the circumstances and conditions of the property were rapidly changing and increasing in value. Under these facts and circumstances, we think it would be inequitable to decree specific performance of the contract in this case. The judgment of the lower court is therefore reversed, and the cause remanded for new trial.

DE WITT, J., concurs.

HARWOOD, J. (dissenting).—From reading the prevailing opinion, without acquaintance with the record of this appeal, I should conclude the court had decided a case involving the following conditions: If an opulent speculator, forehanded, with thousands of dollars in ready cash, should contract to purchase a lot in a town site, pay one-fourth of the purchase price, and, having partly constructed a building thereon, according to the requirements of the contract, should leave it unfinished and abandon the premises without cause or excuse, and fail to pay the taxes thereon for some three years, and then bring an action to enforce specific performance of such contract, he ought to be denied the relief sought. Such is the case, as it seems to me, which is set forth and determined by the foregoing treatment, and the decision, as applied to such a case, would undoubtedly be correct. But to me the record of this appeal discloses quite a different case, and therein will be found the ground of my dissent from the decision of the majority of this court.

Before proceeding to an examination of the record, however, it is well to observe the principles or conditions on which a court of equity would refuse to entertain plaintiff's action, because of delay in presenting his complaint, where the action is brought within the time prescribed by the statute of limitations. This case is decided entirely on the

proposition that plaintiff ought to be denied the relief sought—that is, specific performance of the contract for the purchase of said lot—because of laches on his part, as this court holds, in failing to bring his action earlier. His action is not barred by the statute of limitations, although the Code of the state prescribes a limitation for such action. Where statutes of limitations have been enacted prescribing the periods within which various suits may be brought, courts of equity recognize and shape their practice in conformity thereto, in so far as time only is considered as ground for denying the relief. The limitation prescribed by statute is based on no equitable ground, but on consideration of public policy, and bars the action, irrespective of equitable considerations. Therefore in modern equity practice, where such statutes prevail, courts of equity will not and ought not refuse relief in an action brought within the period of limitation, simply by an arbitrary holding that the claim or right sought to be enforced is stale, and that the complainant is guilty of laches merely because he had not come into court earlier with his complaint. It cannot be logically held that a right or demand is stale solely because a certain period of time has elapsed since the right of action arose, if it is still within the statute of limitations. Such holding would be setting up a rule by the court in contradiction of the legislature. The legislature has prescribed the date at which the right or demand will become stale by the lapse of time, and thereby become devitalized of virtue, as it were in view of the law. If, then, the court arbitrarily fixes a shorter period of limitation it contradicts and sets at naught the will of the legislature. Therefore, where such statutes prevail, if the doctrine of laches is to be applied as ground for denying relief in an action brought within the statute of limitations, the laches must arise from, and be based upon, conditions or circumstances which have transpired while plaintiff delayed his action, whereby it would be inequitable to award the relief sought. Such new conditions or circum-

stances, and not merely the lapse of time, is the ground on which plaintiff is held to be too late in asserting his rights. I apprehend that is the true principle on which courts of equity in modern practice where statutes of limitations have been enacted governing all cases, apply the doctrine of laches in certain equitable actions, such as actions for specific performance: Beach, Mod. Eq. Jur., § 568. There is no doubt that, where such conditions have intervened, courts of equity will deny relief, because the relief sought cannot, with equity, be enforced, although the action is brought within the period of limitation prescribed by statute. The real point involved in this case is whether such conditions have intervened. Therefore, if plaintiff, who has brought his action within the period prescribed by the statute of limitations, is to be denied relief on the ground of laches, such holding ought to be founded on the fact shown, that through his fault and his delay in commencing his action, defendant had been misled, or circumstances have so changed as to make it inequitable to award specific performance. But no such conditions, in my opinion, are shown by the record in this case.

It appears that plaintiff purchased said lot in the latter part of January, 1887, and paid thereon \$87.50, being one-fourth of the purchase price. The other installments of the purchase price of \$87.50 each, were, according to the conditions of the contract, to fall due on the 22d day of April, July and October of that year. Plaintiff thereupon undertook the erection of a house on said lot, which was required by the terms of the contract to be erected, to cost not less than \$500. In the course of that undertaking, and to obtain money in aid thereof, plaintiff negotiated a loan of \$125 from a bank in Great Falls, and to obtain surety for that loan, plaintiff assigned his contract for the purchase of said lot to Mr. Paris Gibson, vice-president of defendant town-site company, for which indemnity Mr. Gibson signed plaintiff's note as surety for said loan. The money thus ob-

tained plaintiff expended in his endeavor to erect said building. On this point plaintiff testified: "I did not use any part of the \$125 borrowed on the note to make the first payment on the contract. I bought windows with it and a little lumber; bought five windows of Murphy & Maclay, and the lumber that went into the house I bought partly from the Holter Lumber Company and partly from Mr. Meyers." When said note fell due, about July of the same year, plaintiff was unable to pay it then, but a few weeks later, having secured the money with which to pay said note, plaintiff went to the bank, found said note there, learned from the banker the full amount due thereon, including interest, and informed the banker that he would return the next day and pay the note. But on his return to the bank the next day plaintiff was informed by the banker that Mr. Gibson had preceded him there and paid said note, and had taken the same along with the contract for the purchase of said lot, which contract was assigned to Mr. Gibson, as aforesaid. A few days later plaintiff called on Mr. Gibson and offered to pay the note with money which he had borrowed for that purpose. But Mr. Gibson said on that occasion he did not know whether he would receive the money or not; and plaintiff called a second time, as he states in his testimony, and offered to pay to Mr. Gibson the money due on the said note and contract, but plaintiff was put off by Mr. Gibson saying, "I will see." Plaintiff testifies that he was then ready and willing to pay all money due on said contract and note, and had the ability to pay it. He said he had borrowed the money for that purpose, but the payment was not received by the company, and the transaction remained in that condition without payment being made or received until the 22d of October, 1887, when the last installment, according to the terms of said contract, fell due. On that date, as the facts are shown by the testimony and found by the court and in no manner disputed, plaintiff, having borrowed money sufficient for that purpose, caused

to be tendered to defendant town-site company and to its officers the full amount due on said contract, but the same was refused. It does not appear from any testimony in the record that this payment was refused on the ground that plaintiff had up to that time failed to complete the house on said premises, nor was any reason assigned by the company for refusing to receive such payment, nor was plaintiff notified of defendant's intention to undertake the forfeiture of plaintiff's rights and interests in said lot, together with his investments therein. Plaintiff was in actual possession of said premises, residing with his family in the house which he had erected thereon, at the expense, up to that time, of \$330, as found by the court. The house appears to have been plastered and finished inside, and sided with rough lumber on the outside, so as to be habitable in that season of the year, but it still lacked the finishing siding, corner boards and painting necessary to complete it, and lacked the expenditure of \$170 thereon to fulfill the terms of the contract as to the cost of the improvement. On this point, in the course of plaintiff's testimony, he said: "I moved into the house with my family, consisting of my wife and child, in May, and lived in it until my wife was confined and able to leave, when I moved back to my ranch, about five miles east of Great Falls, having lived in the house six weeks or two months. After moving out of the house I saw it every week, going back and forth. I had it rented for a while." There is no dispute about the facts set forth above, or, indeed, as to any material facts presented by the record in this case.

It is obvious, from the condition of said house, as shown by the testimony, that in order to save the structure, with what plaintiff had expended thereon, he would be obliged to have gone on and completed it by supplying the necessary siding. Moreover, the company could have withheld from plaintiff a deed, on his payment of the purchase price, and demanded the immediate completion of said house,

with notice that in the event of failure therein the company would proceed according to law to recover the premises and forfeit plaintiff's investments therein. But the company made no such demand, nor any demand, nor gave any notice whatever, so far as appears from the record in this case. It appears that plaintiff was holding a ranch claim a few miles from Great Falls, and that in the month of September or October of the same year he moved thereto with his family. On this point plaintiff testified: "I lived in the house until September or October, and then moved to the ranch. I may be mistaken as to the length of time. I had a tenant who remained in the house two or three months." After plaintiff removed therefrom, as shown by the testimony and findings, defendant company, through its officers and agents, unlawfully entered therein and took possession of said house and lot, and caused said house to be finished by putting the siding and corner boards thereon, at the expenditure of \$125, and has ever since held said premises, receiving the rents and use thereof, which the court found to be of the value of \$392.50. In addition to the expenditure of the \$125 in finishing said house defendant company caused to be built a fence about said lot, which "consisted of posts with one scantling on top," according to the testimony of defendant's witness, who built it. The company also caused five shade trees to be planted upon the lot, the cost of which is not stated. Such fence and shade trees, however, were not required by the contract of sale to plaintiff. Such was the extent of defendant's expenditures on said lot. If it had increased in value to the sum of \$2,000, such increase was not caused by anything done in respect thereto by defendant.

Among the delinquencies set down against plaintiff in the statement of the case which precedes the prevailing opinion, it is said: "The evidence shows, and the court finds, that the plaintiff failed to pay the taxes thereon before the commencement of this action, amounting to \$60."

That might have the appearance of abandonment of said premises; when considered alone. But no such impression emanates from that fact when it is put in its proper relation to the other facts shown in this case. The facts are, as shown by the record, that plaintiff went into possession of the lot early in the year 1887, after the taxes for the preceding year were due and payable by the town-site company, and about the close of the same year, or early in the year 1888, the town-site company unlawfully dispossessed plaintiff, took possession of said lot, with all improvements that plaintiff had erected thereon, and has held and enjoyed the use and benefit thereof ever since. Who, then, under such circumstances, should have paid the taxes on said lot? The fact is that the trial court found the issues in this case in favor of plaintiff, and that he was entitled to a specific performance of said contract, but at the same time required plaintiff to do equity in the premises—that is, to pay all that was due on the contract, and reimburse what defendant town-site company had paid out on the premises; and in so doing, the court found, not that plaintiff had failed to pay the taxes on said premises, amounting to \$60 (as though he was delinquent in that respect), but that the town-site company had paid out that sum in taxes thereon during its unlawful holding of the premises from plaintiff, which sum was credited to the town-site company against the value of the rents and profits with which it was charged, amounting to \$392.50.

This court appears to take the position that plaintiff ought to show some excuse for not bringing his action earlier, although it was brought within the period prescribed by the statute of limitations. Plaintiff was questioned on this point, and in his testimony, gave the court a direct answer, as follows: He said: "There was no reason for not taking steps to compel the company to make a deed, except that I was financially fixed so that I could not. I suppose I could have borrowed a few hundred dollars on short

notice. I was running a ranch. I am now a roustabout—general work—doing work at day labor. I was getting \$4 per day in the spring of 1887; \$4.50 per day in 1886; but it was not steady work. I got \$3.50 per day in 1888. I don't remember what I got in 1889. I was raising crops and holding the ranch down. I do not own the ranch now. I sold it. I had several thousand dollars last fall, and had at all times the ability to get money." I observe that the last remark in the above statement of plaintiff is quoted against him in the prevailing opinion, coupled with the observation that plaintiff's delay "is not explained, or in any way attempted to be explained, or excused. In fact, it seems no excuse for this delay existed." And the same is reiterated in other parts of the opinion. But there is no dispute that plaintiff's financial condition was as he stated until he sold his ranch claim; and his repeated borrowings, in his struggle to fulfill the terms of said contract, and save said lot and his investments therein from forfeiture, corroborate plaintiff's statement as to his scant resources. And, finally, when plaintiff had exhausted his savings and borrowings, the defendant company, without notice, and without demand on plaintiff to complete the fulfillment of said contract, already so far advanced, and without process of court, unlawfully and forcibly entered said premises, evicted plaintiff, and assumed and held what he had invested therein. Such is the case shown by the record, without dispute. If we sat like schoolmasters, with watch in hand, to question litigants who come into court within the period prescribed by statute as to the reason why they did not come a little sooner, I think the excuse given by plaintiff, corroborated by all the other facts shown, is worthy of consideration. But in my opinion it is more to the purpose of the law to inquire whether circumstances have so changed while plaintiff delayed his action as to make it inequitable to compel a conveyance. But no such circumstances are shown. It is said in the prevailing opinion, "the circum-

stances and conditions of the property were rapidly changing, and increasing in value." If we look to the record, we find that the only change wrought in the condition or circumstances of the property was that after unlawfully evicting plaintiff the defendant town-site company expended on said premises the small sum necessary to finish and avail itself of plaintiff's expenditures thereon; and, in that condition, defendant has ever since held and enjoyed the use and profits thereof. The increase in the value of the premises arose from nothing that defendant did in relation thereto, so far as shown by the record, but from general and remote causes. If the property rose in value from the discovery of mines, for instance, in adjacent country, is that to be regarded as a blessing to which the defendant corporation had a peculiar and superior right? And if defendant had wrongfully and oppressively invaded plaintiff's rights, declared forfeiture, and made eviction without notice or process of court, and confiscated plaintiff's interests and investments in said property, are such acts as to be regarded as justified, beyond rectification, because the property has risen in value through natural and remote causes? Because of such blessing upon the land by nature, would it be inequitable for the court to redress the wrong done to plaintiff, and see that right, fairness and justice prevail? These questions are not answered by voluminous quotations from decisions founded on an entirely different state of facts. The increase in value may have been the very motive which impelled defendant to such arbitrary and unlawful conduct: at least, it was losing nothing, but gaining much. Notwithstanding such showing of constant increase in value, this court, in shutting the door of the trial court against plaintiff, remarks, "Could the plaintiff lie by, and wait to see whether his contract was a good one?" The record answers that when plaintiff was thrust out of the property he was compelled, by his impoverished condition, to lie by, and see the property which he had so nearly gained con-

stantly rise in value in the unlawful grasp of defendant, and that increase was without the act of defendant, except the expenditure of a trifling sum to avail itself of plaintiff's investments. By borrowing money, and offering payment of the sums required by the contract when the last installment fell due, plaintiff showed himself willing and eager to carry out the contract. After he was dispossessed, of course, plaintiff could not finish said house, and defendant made the same impossible by causing said house to be finished for its own advantage. This court does not venture to hold, and I apprehend no court would, under the authorities, hold, that time was of the essence of the said contract. Besides, this defendant had no lawful right to undertake to enforce forfeiture and eviction without demand or notice or process of court. Defendant had power to enforce its contract by lawful means and processes, and this is sufficient for any citizen of this state. The facts, as disclosed by the record, in my opinion, fully warranted the decision of the trial court, awarding specific performance.

As a rule to entitle himself to a decree of specific performance of a contract the plaintiff must show himself ready, desirous and prompt to fulfill his own part thereof: *Milward v. Earl of Thanet*, 5 Ves. 720 n.; *Eads v. Williams*, 4 De G., M. & G. 691; *Alley v. Deschamps*, 13 Ves. 225; *Williams v. Williams*, 17 Beav. 213; *Mills v. Haywood*, 6 Ch. D. 866; *Fry Spec. Perf.* (ed. 1892) § 1192. Delay in bringing suit may show a failure to fulfill this condition of equitable relief, and as equity decrees specific performance, not as matter of absolute right, it follows that there may be cases in which the Chancellor will refuse a decree, even where the time fixed by the statute of limitations as the bar to an action on the contract itself, or to a similar action, has not expired, as will appear by cases cited below, but it is to be noted that there are cases in which it is denied that any delay short of the time of the statute will bar relief. See *Fahs v. Taylor*, 10 Ohio, 104; *Larrowe v. Beam*, Ib. 498; *Karns v. Olney*, 80 Cal. 90 (this case, however, speaks of an *absolute* bar); and see as favor-

ing this view, *Gist v. Cattell*, 2 Dessau, 53. The general rule, however, seems to be that any unexplained and unreasonable delay in bringing suit will be a bar to the action. In determining what is an unreasonable delay, a court will be guided very largely by the circumstances of the case before it, and especially by the consideration, whether or not the contract it is urged to enforce be one in which time is of the essence. When time is of the essence delay on the part of the plaintiff will be looked at with strictness: *Fry Sp. Perf.*, § 1091; *Moss v. Barton*, L. R. 1 Eq. 474; *Austin v. Tawney*, L. R. 2 Ch. 143. Where circumstances have materially altered between the making of the contract and the attempt to enforce it, the court may regard a delay, which otherwise would not suffice to bar the relief, as sufficient to have that effect. Thus in *Smith v. Cansler*, 83 Ky. 367, a sale of premises was made on October 21, 1882, the deed to be made October 23; the tender of the deed was not made until the 25th, when it was objected to as informal, and was returned for correction; on the 26th the premises were destroyed by fire; another deed, also informal, was tendered on October 30; and on November 2 a suit for specific performance was brought, and pending the suit a sufficient deed was tendered; the court refused a decree. But where there is a mere delay, unless it be for such a time as to stay the hand of equity without an added inducement, the fact that the value of the property has changed will not be ground for refusing a decree: *Day v. Hunt*, 112 N. Y. 191; *Willard v. Foster*, 24 Neb. 205; even if the defendant has notified the plaintiff that he will cancel the bargain: *Langan v. Thummel*, 24 Neb. 265. This is not, however, to be carried so far as to permit a purchaser to lie by with the intention of abandoning or enforcing the contract, as it may prove a gaining or a losing bargain: *Alley v. Deschamps*, 13 Ves. 223; *S. E. Ry. Co. v. Knott*, 10 Hare, 122; *Alloway v. Braine*, 26 Beav. 575; *Firth v. Greenwood*, 1 Jur. N. S. 866; 2 *White & Tudor L. C. in Eq.* 560.

Where one party has notified the other that he withdraws from the contract, the other, if he seek to hold him to it, must proceed with great diligence. The time within which he must proceed is not accurately determined, but Lord ROMILLY in *Colby v. Gadsden*, 34 Beav. 418, says that it must not exceed a

year. And see *Watson v. Reid*, 1 R. & My. 236; *Parkin v. Thorold*, 16 Beav. 59; *O'Donnell v. Jackson*, 69 Cal. 622.

For cases where delay in bringing suit has been held unreasonable, and therefore a bar to a suit for specific performance, see *Southcomb v. Bishop of Exeter*, 6 Hare, 23 (nineteen months); *Eads v. Williams*, *supra* (three and a half years); *Stuart v. L. & N. Railway Co.*, 1 De G., M. & J. 721 (twenty-one months); *McMullen v. McMullen*, 7 Mon. 560 (five years); *Sampson v. Atkinson*, 39 Minn. 238 (one year); *Ruff's Appeal*, 117 Pa. 310 (eight years); *Requa v. Snow*, 76 Cal. 509 (three years); *Young v. Young*, 45 N. J. Eq. 27 (nine years); *Combs v. Scott*, 76 Wisc. 662 (six years); *Hatch v. Kizer*, 140 Ill. 583 (eight years). And see *Wilson v. Sampson*, 68 Tex. 306; *Love v. Welsh*, 97 N. Car. 200; *Randolph v. Ware*, 3 Cr. 503; *Atkinson v. Robinson*, 9 Leigh, 393; *Barrett v. Emerson*, 6 Mon. 607; *Normant v. Eureka Co.*, 12 So. (Ala.) 454; *Shisler's Estate*, 2 Dist. R. (Pa.) 588; *Cocanaugher v. Green*, 14 Ky. L. R. 547; *Molasky v. Perry*, 76 Cal. 84; *Foster's Estate*, 6 Pa. C. C. R. 223; *Northrup v. Stevens*, 39 Minn. 105; *Knox v. Spratt*, 23 Fla. 64; *McCabe v. Mathews*, 40 Fed. Rep. 338; *Dynan v. McCulloch*, 46 N. J. Eq. 11; if, in addition to the delay, it appears that the defendant has made expenditures upon the property with the knowledge of the plaintiff, that consideration will affect the judgment of the court: *Penrose v. Leeds*, 46 N. J. Eq. 294; *Barbour v. Hickey*, 24 L. R. A. 763.

But mere delay has been held not a bar in *Kinna v. Smith*, 2 Green Ch. 14 (twelve years); *Haffner v. Dickson*, 2 Har. & J. 46 (twenty-seven years); *Pomeroy v. Fullerton*, 21 S. W. (Mo.) 9; *Nelson v. Covington*, 4 Munf. 332; *Reardon v. Seary*, 1 Litt. 53.

The rule above stated that delay may be a bar to a suit, applies to unexplained delay only, and a sufficient explanation will destroy the effect of even a long delay, as where the party defendant is himself the cause of the delay, as by an unreasonable objection to title, by failing to make a proper title or otherwise: *Monro v. Taylor*, 3 M. & G. 713; *Morse v. Merest*, 6 Mad. 26; *Peters v. Canfield*, 74 Mich. 498; *Johnston v. Jones*, 85 Ala. 286; *King v. Morford*, Saxt. 274; *Aylett v. King*, 11 Leigh, 486; but a purchaser who has taken trifling and vexatious objection to the title and has shown a disposition to get rid of the con-

tract, will not be aided, especially if the value of the property has increased: *Spinner v. Hancock*, 4 Ves. 667; *Pope v. Simpson*, 5 Ib. 145; *Burke v. Smyth*, 3 J. & L. 193; *Simpson v. Atkinson*, 39 Minn. 238. The grounds of explanation which will excuse apparent laches are not confined to cases in which the defendant has been responsible for the inaction on the part of the plaintiff. See *Baker v. Morris*, 10 Leigh, 284; *Tate v. Greenloe*, 2 Hawks, 784; *Craig v. Leiper*, 3 Yerg. 193. In the recent case of *Ryder v. Loomis*, 161 Mass. 161, delay was excused, even after a refusal by the defendant to carry out the contract, where it was induced by a hope of a final settlement and a reluctance to enter upon a family contest. In *Young v. Young*, 51 N. J. Eq. 491, it was held that delay would not prevent specific performance, when the complainant had promptly sought the advice of counsel, the case was difficult and the advice was not uniform. Poverty is not an excuse of laches: *Perry v. Craig*, 3 Miss. 316. A plaintiff who begins a suit within a short time after learning that his right is disputed is not barred by laches: *Moore v. Crawford*, 130 U. S. 122. When the plaintiff, if vendee, has been in possession of the land which is the subject of the contract, he is not guilty of laches if he refrains from filing his bill until the vendor sues to recover the possession of the land: *Clark v. Moore*, 1 J. & L. 723; *Sharp v. Mulligan*, 22 Beav. 606; *Shepherd v. Walker*, L. R. 20 Eq. 659; *Burke v. Smyth*, 3 J. & L. 193; *Ridgway v. Wharton*, 6 H. L. C. 292; *New Barbadoes Toll Bridge v. Vreeland*, 3 Green Ch. 157; *Hall v. Peoria & E. Ry. Co.*, 143 Ill. 163; but the possession must be under and by virtue of the contract, and the vendor must have notice, actual or constructive, that the vendee claimed under the contract: *Mills v. Haywood*, 6 Ch. D. 196.

Continual claim will not keep alive a right otherwise barred by laches: *Lehmann v. McArthur*, L. R. 3 Eq. 496. In *Raymond v. San Gabriel Valley Land & W. Co.*, 10 U. S. App. 601, it was held that a defendant, to avail himself of the plaintiff's laches, as a defense in a suit for specific performance, must show that he has himself been ready, desirous, prompt and eager to perform on his own part.

Specific performance—Unilateral contract—Mutuality.**WATERS v. BEW ET UX.**

(Court of Chancery of New Jersey, June 28, 1894.)

Specific performance may be decreed of a contract to convey land at the request of a lessee, where such contract is part of an agreement to lease the said land.

Under an agreement for the sale of land the purchaser is entitled to a deed describing the land in the words of the agreement, and no limitation can be superadded.

Specific performance of an agreement to convey land will not be refused on the ground of uncertainty of contract because the agreement contains a condition that there shall be reserved to the grantor a right of way, which way is not located by the agreement, for the grantor has the right to designate the way in his deed.

This was a suit brought by Georgene Waters against Richard Bew and Sophia, his wife, to compel the specific performance of a contract to convey certain lands situated in Atlantic City, New Jersey. The facts are sufficiently stated in the opinion of the Vice-Chancellor.

A. B. Endicott and Samuel H. Grey, for complainant.

David J. Pancoast, for defendants.

GREEN, V. C.—Richard Bew was the owner in fee of a tract of land on the easterly side of Illinois avenue, lying between what is known as the "Windsor Hotel Tract" and the ocean, the title to which he derived by deed from Mary Disston, executrix of Henry Disston, dated September 18, 1880; and the land under water in front of said upland and in front of the easterly half of said Illinois avenue, the title to which was derived by two several grants from the state of New Jersey, the one dated May 6, 1882, and the other dated June 23, 1883. Richard Bew and Sophia, his wife, by an agreement with Georgene Waters, dated at the beginning thereof, May 21, 1888, and in the attested clause

May 31, 1888, in consideration of the yearly rent therein reserved and the agreements and covenants therein contained leased unto the said Georgene Waters "all that lot of land situate in Atlantic City, in the county and state aforesaid, on the easterly side of Illinois avenue, southerly from Pacific avenue and extending from the ocean side of the Windsor lot or line formerly called the 'Berkeley Property,' southwardly to the ordinary high-water mark of the Atlantic Ocean and eastwardly from Illinois avenue, between the southerly line of the Windsor lot and said ordinary high-water line of the said ocean, a distance of seventy feet," with conditions as to the use of the said property. The lease was to begin on May 21, 1888, and to expire on the 21st of May, 1893, at an annual rent of \$300. The said agreement contains these further covenants, viz.: That upon the payment by the said complainant to the said defendants, "at any time during said term of five years, of the sum of \$15,000, they, the parties of the first part, will grant, bargain and convey to the said Georgene Waters, her heirs and assigns, the land above mentioned and described, with covenants of general warranty, upon the condition, however, that there be reserved to the parties of the first part a right of way across said land ten feet in width, beginning at a point in Illinois avenue at least thirty feet south of the southerly line of the Windsor lot, and extending eastwardly across said lot;" and upon the further condition "that no building shall be erected southwardly of said line thirty feet south of the Windsor lot as aforesaid." The complainant entered upon the possession of the property and occupied it continuously, paying therefor the rent reserved. Before the expiration of the lease she demanded a deed, and offered to pay the purchase-money. She procured a deed of the property to be drawn by counsel, from the defendants to herself, conveying the land by the following description: "Beginning at a point in the east line of Illinois avenue 975 feet south of Pacific avenue, and run-

ning (1) southerly in the easterly line of Pacific avenue to ordinary high-water mark of the Atlantic Ocean ; (2) easterly along the ordinary high-water mark of said ocean, 70 feet ; (3) northerly, parallel with Illinois avenue, to a point 975 feet south of Pacific avenue ; (4) westerly parallel with Pacific avenue, 70 feet to beginning—excepting and reserving to the grantor and his heirs and assigns, a right of way ten feet in width across the lands hereby conveyed, beginning at a point in the easterly line of Illinois avenue, 30 feet south of the southerly line of the Windsor Hotel lot, and extending eastwardly in a line parallel with the line of the Windsor lot, across the lot hereby conveyed. And this conveyance is made upon the condition that no buildings shall be erected southwardly of the said land 30 feet south of the Windsor Hotel lot as aforesaid.” This deed the defendants refused to execute, but, on their part, they did prepare, execute and tender a deed describing the property as follows: “ All that lot of land situate in Atlantic City, in the county and state aforesaid, on the easterly side of Illinois avenue, southerly from Pacific avenue, and extending from the ocean side of the Windsor lot or line, and formerly called the ‘ Berkeley Property,’ southwardly to the ordinary high-water mark of the Atlantic Ocean, and eastwardly from Illinois avenue, between the southerly line of the Windsor lot and said ordinary high-water line of the said ocean, a distance of 70 feet ; excepting and reserving to the grantors, their heirs and assigns, a right of way across said land ten feet in width, beginning at a point in Illinois avenue at least 30 feet south of the southerly line of the Windsor lot, and extending eastwardly across said lot. And this conveyance is made upon condition that no buildings shall be erected south of the said line 30 feet south of the Windsor lot as aforesaid. And this conveyance is not intended to convey any part of or interest in the land under water, southward of and adjoining the high-water line herein referred to, which the grantor Richard Bew acquired from the state of New Jersey

by two several deeds," etc. This the complainant refused to receive, and has brought this suit for a specific performance of the contract under the following prayer: "That the said Richard Bew and Sophia Bew may be compelled by this honorable court's decree specifically to perform the said agreement with your oratrix, and, after being paid the purchase-money, to execute to your oratrix a proper conveyance of said tract of land. Your oratrix hereby offers to pay said purchase-money at any time"—and for other relief.

In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands; and the vendor, of the purchase-money. After the contract the vendor is the trustee of the legal estate for the vendee: *Haughwout v. Murphy*, 22 N. J. Eq. 531, at page 546. Applying this principle, the complainant, on exercising the option, became the equitable owner of the land; and the defendant, Richard Bew, the equitable owner of the purchase-money. The suit for specific performance is for the purpose of giving such equitable owner the legal title. In accomplishing this end such equitable owner is entitled to a deed of the land agreed to be conveyed, and, if any dispute should arise as to the description, in the words of the agreement. The deed prepared by the complainant not only misnamed Illinois avenue, but did not describe the lands in the words of the agreement, and also located the right of way. The deed tendered by the defendant did describe the property as in the agreement, but annexed thereto a limitation of a conveyance not therein contained, and the dispute between the parties is really as to this limitation. I am of opinion that the complainant is entitled to a deed in the words of the agreement, running to high-water mark, without any clauses of limitation other than those agreed on. If a party should make a contract for the purchase of a lot of land bounded on a highway, he would undoubtedly be entitled to a deed conforming to that description, with-

out limitation or addition not contained in his agreement. Whether, in this case, such a description would or would not entitle the grantee to any rights to lands under water is a question which it is not the province of this court in a suit of this character authoritatively to determine, the simple question being as to the deed which the complainant is entitled to receive. I do not think that the complainant has forfeited her right to specific performance by the preparation of the deed which she requested the defendants to execute, or her refusal to accept the deed tendered.

It is objected that this contract will not be decreed to be specifically performed because it is unilateral. This agreement to convey is part of an agreement to lease the premises for a term of years. Under that lease and that part of the agreement the complainant has paid the defendants the yearly rent reserved, and, within the time limited, elected to exercise her option of purchase. The rule as to the non-enforcement of contracts, where there was no mutuality of covenants and remedy, is not without exception, and it is held in *Hawralty v. Warren*, 18 N. J. Eq. 124, that an optional agreement to convey or renew a lease without any covenant or obligation to purchase or accept, or without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it. See, also, *Pom. Spec. Perf.*, § 169, note 1, and cases cited; also, *Hall v. Center*, 40 Cal. 63; *Maughlin v. Perry*, 35 Md. 352.

It is further objected that this agreement will not be specifically enforced because it is indefinite with reference to the location of the right of way to be reserved to the grantors. *Taylor v. Gilbertson*, 2 Drew. 391, cited by defendants' counsel, was to enforce a contract for the conveyance and purchase of certain lands. The vendee refused to perform on the ground that the title was clouded by a provision in some former conveyance or agreement, by which a drive-way was to be

made; but the vice-chancellor held that this was not a valid excuse, as it was doubtful where it was intended that this drive-way was to be located, or who was to make it, and that there was no one who could take advantage of the covenant, and therefore held that the vendee took no risk by accepting the conveyance.

I see no difficulty in this case. The vendor is to have a right of way from Illinois avenue across the lot. No houses are to be built upon this tract. The only provision of the agreement with reference to its location was that it was to begin at a point in Illinois avenue at least thirty feet south of the southerly line of the Windsor lot. The right of way is one to be reserved by the grantors. They have the right to locate it. The only restriction in the agreement as to its location is that it shall not be within a certain distance of the Windsor lot. The grantors should exercise their right of designation, and they must do it once for all. Being a reservation contained in the agreement and the right of location resting with the grantors, there can be no objection to the designation being contained in the deed, which procedure is sanctioned by the complainant by incorporating it in the deed prepared by her counsel. In my opinion the complainant is entitled to a decree for specific performance—to receive a deed from the defendants for the property as described in the agreement, with the condition and limitations therein expressed, and without any others—and I will advise a decree to that effect.

“A contract to be specifically enforced by the court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter

way might itself be free from the difficulty attending its execution in the former:" Fry Spec. Perf. (ed. 1892), § 460; *Armiger v. Clarke*, Bunb. 111; *Ricketts v. Bell, Kee, G. & Son*, 335; *Flight v. Bolland*, 4 Russ. 298; *Hamilton v. Grant*, 3 Dow. 33; *Avery v. Griffin*, L. R. 6 Eq. 606; *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249; *Johnson v. S. & B. Ry. Co.*, 3 De G., M. & G. 914; *Stocker v. Wedderburn*, 3 K. & J. 393; *Pelo v. B. U. & T. W. Ry. Co.*, 1 H. & M. 468; *Laurenson v. Butler*, 1 Sch. & L. 13; *Rutland Marble Co. v. Ripley*, 10 Wall. 339; *Pub. Co. v. Western Un. Tel. Co.*, 83 Ala. 498; *Anson v. Townsend*, 73 Cal. 415; *Smith v. Smith*, 36 Ga. 184; *Lasher v. Gardner*, 124 Ill. 441; *Ikard v. Beavers*, 106 Ind. 485; *Oliver v. Daugherty*, 3 Greene (Iowa), 371; *Maynard v. Brown*, 41 Mich. 298; *Simon v. Wildt*, 84 Ky. 157; *O'Brien v. Pentz*, 48 Md. 562; *Butman v. Porter*, 100 Mass. 337; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43; *Voorhies v. Frisbie*, 25 Mich. 476; *Alworth v. Seymour*, 42 Minn. 526; *Aston v. Robinson*, 49 Miss. 348; *Ducie v. Ford*, 8 Mont. 233; *Ewins v. Gordon*, 49 N. H. 444; *Schröder v. Germeinder*, 10 Nev. 355; *Woodruff v. Woodruff*, 41 N. J. Eq. 349; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273; *Benedict v. Lynch*, Ib. 370; *Justice v. Lang*, 42 N. Y. 493; *Tarr v. Scott*, 4 Brewst. 49; *Meason v. Kane*, 63 Pa. 335; *Ballou's Appeal*, 133 Pa. 64; *Bradford v. Foster*, 87 Tenn. 4; *Chilhowie Ins. Co. v. Gardner*, 79 Va. 305; *Ford v. Euker*, 86 Va. 75; *De Cordova v. Smith*, 9 Tex. 144; *Morgan v. Morgan*, 2 Wheat. 290; *Hayes v. O'Brien* (Ill.), 26 N. E. 601; *Stembridge v. Stembridge*, 87 Ky. 91; *Geiger v. Green*, 4 Gill, 672; 22 Am. & Eng. Ency. of Law, 1019; *Tyson v. Walls*, 1 Md. Ch. 13; *Ward v. Dickey* (Va.), 17 S. E. 818; *Ten Eyck v. Manning* (N. J.), 27 Atl. 900; *Winter v. Trainor*, 151 Ill. 191.

There are, however, exceptions to this rule and a unilateral contract may give to one party a right which may be specifically enforced, although there is no corresponding right enforceable at the suit of the other party: Fry Sp. Perf., § 465; *Rogers v. Saunders*, 16 Me. 92; *Miller v. Cameron*, 45 N. J. Eq. 95; *Ives v. Hazard*, 4 R. I. 14; *Garretson v. Vanloon*, 3 Greene (Iowa), 128. An instance of this is a covenant in a lease to renew at the request of the lessee: *Chesterman v. Mann*, 9 Hare, 206; *Bell v. Howard*, 9 Mod. 302; *Furnival v. Carew*, 3 Atk. 83;

Tutton v. Foote, 2 Bro. Ch. 636; *Story Eq. Jurisp.*, §§ 722, 729; so an agreement, connected with or part of a lease, or entering into the consideration thereof, that the lessee may purchase the demised land: *Kerr v. Day*, 14 Pa. 112; *Hawralty v. Warren*, 18 N. J. Eq. 124; *In re Hunter*, 1 Edw. Ch. 1; *Newell's Appeal*, 100 Pa. 1; so where a right is given to search for minerals with the privilege of buying the land within a fixed time at a fixed price: *Corson v. Mulvany*, 49 Pa. 88.

It is held in many cases that an option falls within the class of contracts which may be enforced specifically at the suit of the person to whom the option is given, on the ground that by an election, made before the offer of the other party is withdrawn, to treat the contract as binding, it is brought within the rule of mutuality: *Weeding v. Weeding*, 1 J. & H. 424; *Wilks v. Georgia Pac. R. R.*, 79 Ala. 318; *Miller v. Cameron*, *supra*; *Clark v. Gordon (W. Va.)*, 14 S. E. 255; *Moser v. McClain*, 82 Ala. 370; *Ross v. Parks (Ala.)*, 8 So. 368; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Dickinson v. Dodds*, 34 L. T. Rep. (N. S.) 19, 607; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. 224; *Bradford v. Foster*, 3 Pickle, 4; *House v. Jackson (Oreg.)*, 32 Pac. 1027; *Watts v. Kellar*, 56 Fed. Rep. 1; but the acceptance must be strictly according to the terms of the contract: *Schulds v. Horbach*, 30 Neb. 536, and if the person entitled to an option to take land endeavor to impose terms, which are not included in the original offer, there is no such acceptance as will give him a right to ask for a specific performance: *Egger v. Nesbit (Mo.)*, 27 S. W. 385. On the other hand, it is held that an optional contract not supported by other consideration is not enforceable specifically: *Sullings v. Sullings*, 9 Allen, 234; *Butman v. Porter*, 100 Mass. 337; *Wright v. Weeks*, 3 Bosw. 37; *Woodward v. Harris*, 2 Barb. 442; *Hayes v. O'Brien*, *supra*; and see *Barker v. Critzer*, 35 Kan. 459; *Barker v. Cross*, *Ib.* 463; *Maynard v. Brown*, 41 Mich. 298; *Rust v. Conrad*, 47 *Ib.* 449.

Fraud—Rescission—Inadequacy of Price—Concealment.ALLEN *v.* BROOKS.

(Supreme Court of Wisconsin, October 2, 1894.)

[Reported 88 Wisconsin, 265.]

DEAN *ET AL.* *v.* BROOKS.

(Supreme Court of Wisconsin, October 2, 1894.)

[Reported 88 Wisconsin, 667.]

ALLEN *v.* BROOKS.

A testator devised lands to the city of Superior before it was incorporated. Some of the heirs quit-claimed their interests therein, for \$100 each, to the defendant, a son-in-law of their uncle, who was to contest the validity of the devise, and if successful was to pay each \$300 more. Had their title been unquestioned their interests would have been worth much more, but were then not marketable. The devise was afterwards adjudged void. It appearing that the grantors were not induced to make the deed by any misrepresentation, concealment or undue influence, that at the time they were anxious to sell, and they knew the state of the title as well as the defendant did, and knew, also, that he depended entirely upon the contingency of success in the proposed legal proceedings to secure any interest in the lands through their deed, *held*, that they were not entitled to have the deed set aside on the ground of fraud.

Appeal from Circuit Court for Douglas county.

The facts are sufficiently stated in the opinion. The plaintiffs appealed from a judgment in favor of the defendant.

For the appellants there was a brief by Reed, Grace & Rock, and John C. Winship, and oral argument by H. H. Grace and Mr. Winship.

Champ Green, for the respondent.

ORTON, C. J.—A brief statement of the facts is as follows : Peter Dean, of the city of Duluth, Minn., died on the 4th

day of January, 1884, seized of the following lands, to wit: The E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 13, township 48, range 13 W., and the S. E. $\frac{1}{4}$ of section 34, township 49, range 14 W., situated in Douglas county, Wis.; also 20 lots in the city of Duluth, Minn. His sole heirs-at-law were his two brothers, Thomas Dean and Dennis Dean; his sister, Mary Duryea; John J. Dean, Sarah A. Teasdale, and Catherine L. Allen, the children and sole heirs of his deceased brother, John Dean; Johanna D. Hayes, Mary T. Saddler, and William Dean, the children and sole heirs of his deceased brother, Alexander Dean. He left his last will and testament, which was afterwards admitted to probate, by which he bequeathed to his sister, Mrs. Mary Duryea, in copper and bank stocks and money, to the amount of \$25,000, and devised to the city of Superior, Wis., the above-described 80 acres, and 160 acres of land situated at or near that place, to be used for public purposes, and to the village or city of Duluth, the said lots situated therein, to be sold after one year and a half, and the proceeds thereof used by said city of Duluth for the purchase and beautifying of small parks, from five to ten acres in extent, throughout said city, for the use of the inhabitants thereof. At the time said will was made, there was no such municipal corporation as the city of Superior in Wisconsin in existence. The heirs knew the provisions of the will, and that there was at least a question whether the bequest to the city of Superior was valid for that reason. There was, however, at the time, a community commonly called the "City of Superior" within the corporate limits of the town of Superior, which was afterwards incorporated as the city of Superior by an act of the legislature in the year 1889. If the title had been unquestionable, said real estate in Wisconsin was reasonably worth the sum of \$80,000; but, as the title was then involved in doubt, it had no marketable value whatever. The said Dennis Dean was the father-in-law of the defendant, George L. Brooks, and they resided near where the lands were situated. In the year 1889, the

said Dennis Dean, being desirous of having proceedings instituted to test the legality of the will, called upon the said John J. Dean, who resided in Milwaukee, and who was the brother of the plaintiffs, and suggested to him to write to the defendant, whom he had requested to take an interest in the subject of this claim of the heirs, for the purpose of having such proceedings instituted. On the 27th day of March, 1889, the said John J. Dean, being fully authorized to act on behalf of the plaintiffs, wrote to the defendant on behalf of himself and the plaintiffs, and requested him to take the matter at once in hand, and push it through, and that all the heirs would join therein, and expressed the hope that he would take it, and realize something out of it for the heirs, as well as for himself, and offered to settle in any way he and his uncle Dennis might arrange it. On the 8th day of April, following, the said defendant wrote to the said John L. Dean, in reply, that Dennis Dean had said something about his purchasing some interest in the property for the purpose of contesting said bequest, and making arrangements to sustain the suit; that as to the value of the interests, in the present shape it is in, it is impossible to determine; that the Wisconsin land is wild, and about six miles from town, and has been platted, and many of the lots sold; and that, as he had requested it, he would make him a proposition to pay \$300 for his and his sister's interest in the lands, to be conveyed by quit-claim deed, and if he perfects the title, he will pay to each one \$300 more, making \$1,200 in all. On April 15, following, John J. Dean wrote the defendant, in reply, that his sisters (the plaintiffs) and himself agree to the proposition if he (the defendant) thinks that nothing better can be done. This is the effect of this correspondence, but not literal. John J. Dean communicated this arrangement to the plaintiffs, and thereupon the sale was consummated by their conveying to the defendant by quit-claim deed all their right, title and interest in said Wisconsin real estate, and \$200 was paid

thereon to the plaintiffs; and on the 20th day of April, 1889, the defendant gave to the plaintiffs an agreement, in writing, in effect that, if he can and do acquire a title to the lands conveyed by them at this date, by quit-claim deed, he will pay them each \$300 more. The plaintiffs tendered to the defendant the money so paid and said agreement, and demanded a reconveyance of their said interests; and, upon his refusal so to do, they commenced this action to have said deed declared void, on the ground of fraud, covin and misrepresentation.

The above facts were, in effect, found by the Circuit Court, and appear to have been established by the evidence. The false representations charged in the complaint are as follows: (1) That there was some property that belonged to Peter Dean that was not disposed of by the will, of the value of \$100. (2) That he could so manage the property as to make for the heirs \$300 to each, and that it was not worth more than \$400. (3) That the other heirs had disposed of their interests at the same rate. (4) It is charged that the defendant knew that the will was void, and that the interest of each heir was of the value of \$40,000. (5) That the defendant concealed the true state of the title, and made said misrepresentations for the purpose of inducing the plaintiffs to execute the deed. (6) That the plaintiffs were ignorant of the true state of the title, and of the value of the Wisconsin lands. The learned judge of the Circuit Court found "that the plaintiffs intended, by the conveyance made by them to the defendant, to sell and convey to him all their right, title and interest in the real estate in question; that they were not induced to make said deed by any fraud or trick on the part of the defendant, or any other person; that they knew, when they made said conveyance to defendant, the conditions of the title of said land substantially as well as the defendant; knew the conditions of said will by which the said Peter Dean attempted to bequeath said land for public purposes, and that, unless said bequests were judi-

cially determined to be illegal and void, they had no interest whatever in said real estate; and they also knew that the defendant, in taking said conveyance from them, proposed instituting legal proceedings to test the validity of said will, and that he depended entirely upon the contingency of success in said proposed legal proceedings to secure any interest whatever in said lands through or under said quit-claim deed. These findings were clearly supported by the evidence.

The above correspondence and the agreement which the defendant gave the plaintiffs at the time of the execution and delivery of the deed show that the plaintiffs knew the condition of the title to their estates, as it was then, and as well as the defendant. The agreement contemplates that there might be a chance for the defendant to secure a good title by having the will declared void in respect to the Wisconsin lands, for it provides that in such a contingency he shall pay them an additional \$300 each. It is true that the defendant was the son-in-law of their uncle Dennis Dean, and that he occupied towards them somewhat a condition of trust and confidence, and might, therefore, the more readily influence them to sell their interests in the estate to him. But there does not appear to be any evidence that the defendant misrepresented the state of the title, or influenced them unduly to sell their interest to him, or that he concealed from them any fact that he knew himself about the estate or the condition of the title. It seems that the plaintiffs needed this ready money, and were anxious to get it. The plaintiffs' brother, John J. Dean, wrote to the defendant: "If agreeable and convenient, we would like you to arrange so we could realize some of it (the money) before Easter; so the girls say." John J. Dean was their duly authorized agent to arrange the terms of the sale, and they ratified everything he did in the matter, and they executed the quit-claim deed without hesitation or objection. The parties seem to have stood on equal terms in relation to the

bargain. John J. Dean had written the defendant: "I hope you will take it, and realize something out of it for us, as well as for yourself. At present it would be a Godsend. . . . I speak for Kate and Sarah, too." What the defendant did with his interest in the lands after he purchased them from the plaintiffs and other heirs has perhaps nothing to do with this case, for this action involves nothing except what occurred at the time of the sale and the conditions then present. But the court found, in effect, that the defendant and the other heirs afterwards commenced an action against the city of Superior to have the bequest of the Wisconsin lands declared void, and the Circuit Court adjudged it void; and, pending an appeal to this court, the matter was settled in such way that the defendant, on paying his proportion for legal services, finally received two-fifteenths of two-thirds of one-half of the Wisconsin lands. This may tend to show, perhaps, how problematic and uncertain the interest of the plaintiffs was at the time of the sale, and the court found that such interest was not then of any marketable value. It seems to be conclusive that there was no fraud in the sale.

From the judgment of the Circuit Court, declaring this bequest to the city of Superior void, it may now appear that this was a hard bargain for the plaintiffs, as they knew it would be in such an event, and they provided against it by an agreement of the defendant to pay them each \$300 more for their interest. But it does not appear that this was a hard bargain at the time it was made, or that the consideration was inadequate, or that it was not then perfectly fair and honest. Future eventualities of a good title and increased values cannot be considered in such a case as the grounds of avoiding the sale. Such a criterion would avoid very many *bona fide* contracts. I have specially considered but one of the findings of the Circuit Court, and that one disposes of the question of fraud in the procurement of the deed. That is the only material issue under

the pleadings. The findings of the court on the facts are full, and appear to be fair and sustained by the evidence.

The learned counsel of the appellants, in the midst of the trial, made an offer to amend the complaint "to correspond with the facts." No amendment was drawn up or submitted, and the brief of the learned counsel does not suggest what specific amendment of the complaint is claimed to have been made. The gravamen of the complaint, as it stands, is that the deed was obtained by false and fraudulent representations and concealment. It is not suggested how the proposed amendment should affect or change these, as the grounds of the action. The proposed amendment is ignored in the findings of fact and conclusions of law, and is too vague and indefinite to be considered by this court. The case comes to this court as it was tried and determined in the court below, and we are governed by the record for a knowledge of the case. If it is claimed that the facts in evidence support some other cause of action than that alleged in the complaint, it is elementary that such an amendment could not be made. The judgment of the Circuit Court is affirmed.

DEAN ET AL. v. BROOKS.

The evidence in this case held to show that a conveyance by an heir of his interest in the estate of his ancestor, made in ignorance of the value of lands devised by the ancestor for public parks and of an arrangement for contesting the validity of the devise, was induced by concealment, deceit and misrepresentation, and should be set aside.

Appeal from Circuit Court for Douglas county.

Action by W. H. Dean and others, heirs-at-law of Thomas Dean, deceased, against George L. Brooks.

It appears from the record that Peter Dean died at his residence in Duluth, January 4, 1884; that he left no widow or children; that he had four brothers and one sister, to wit: Thomas, Dennis, John, Alexander and Mary; that

Thomas and Mary were still living, and resided in New York city; that Dennis was still living, and resided at Superior; that John and Alexander were both dead, and each left three children, as his heirs-at-law; that the children of Alexander all resided in New York city; that the children of John resided in Milwaukee and Cleveland; that January 1, 1884, the said Peter Dean executed his last will and testament, wherein, after providing for his debts, funeral expenses and a monument, he bequeathed to his sister, Mary, his copper and bank stocks and money, sufficient therewith to amount to \$25,000; that he devised to the city of Superior 240 acres of land, to be used by the city for public purposes, and to Duluth certain lots, in trust to be sold, and the proceeds thereof to be used for the purchase and beautifying of parks in Duluth, for the use of the inhabitants of said city; that said real estate, in the aggregate, was of the value of \$80,000; that February 6, 1884, said will was admitted to probate; that August 25, 1887, a final settlement of the debts, legacies and expenses of said estate was made, but the residue thereof was not disposed of; that the defendant is the son-in-law of said Dennis, and resides at Superior; that in the winter of 1889 the defendant and his father-in-law, Dennis, believing that the devises to Duluth and Superior were void, commenced negotiating for the purchase of the interest which the three children of the deceased brother John had in said estate; that the results of said negotiations were that on or about April 20, 1889, the defendant obtained from the three children of John a conveyance of their interest in said estate, as mentioned in the estate of *Allen v. Brooks* (decided herewith), 60 N. W. 253 [*supra*, p. 191]; that the defendant called upon Thomas, in New York, April 23, 1889, and commenced negotiating with him for the purchase of his interest in said estate, and, as a result, the plaintiff, on or about August 7, 1889, agreed to sell and convey, and thereupon did sell and convey his interest in said estate to the defendant for \$300 cash, and,

in case the defendant acquired title by law, then \$900 in addition; that August 8, 1890, Dennis, Mary, the three children of Alexander and the defendant began a suit in the Circuit Court for Douglas county against the city of Superior to have said devise to Superior declared to be void; that October 22, 1890, the Circuit Court overruled a demurrer to the complaint therein; that the defendant thereupon answered, and on the trial the Circuit Court found and held that said devise to Superior was void, and judgment was thereon entered accordingly, and the said Brooks thereupon appealed from said judgment to the Supreme Court of the state of Wisconsin, and, pending that appeal, the same was settled by the parties; that June 5, 1891, the said Dennis, Mary, the three children of Alexander and the defendant petitioned the Probate Court of St. Louis county to have said devise to Duluth declared void, and upon the hearing thereof, after due notice, the same was, August 4, 1891, declared to be void; that, after the Circuit Court for Douglas county held the devise to Superior void, the plaintiff tendered back to the defendant the consideration for the deed mentioned, and demanded a reconveyance, on the ground that such deed had been so obtained by fraud and deceit practiced by the defendant upon the plaintiff, and thereupon commenced this action to set aside said deed, upon the grounds mentioned. The defendant answered, and on the trial the court found, in effect, that the evidence failed to show such fraud or deceit, and rendered judgment in favor of the defendant, from which judgment the plaintiff, Thomas, appealed to this court. Pending the appeal, Thomas died, and thereupon his three children and heirs-at-law were substituted as plaintiffs in his place.

Reed, Grace & Rock and *John O. Winship*, for appellants.
Champ Green, for respondent.

CASSODAY, J. (after stating the facts).—In September or

October, 1888, the defendant married the daughter of the testator's brother Dennis. Dennis had no other child, and from that time on he made his home with the defendant, in Superior. Soon after the marriage, if not before, Dennis made an arrangement with an attorney at Superior to test the validity of the devises mentioned in the foregoing statement. That arrangement, according to the testimony of Dennis, was to the effect that the attorney should prosecute the suit, and pay all costs and expenses, and have for his compensation one-third of all he might recover as the share of Dennis. It appears to have been understood, however, at the time, that Dennis should try and induce the other heirs to join in making such contest. Dennis appears to have been in poor health, and accordingly wanted the defendant to join with him in securing from the estate what he could, and so communicated the arrangement he had so made with his attorney to the defendant, and suggested that he should become interested in the enterprise. Soon after, Dennis visited the heirs in New York, and sought to induce them to join in making the contest. They were all in good financial circumstances, except Thomas. He was over seventy years of age, had no property, and in 1889 was working as a janitor of a school building, at \$92 per month. He had two daughters, living with him at the time, and a son. In January, 1889, Dennis visited his nephew in Milwaukee, and induced him, in behalf of himself and his two sisters in Cleveland, to open correspondence and negotiations with the defendant for the sale and conveyance to him of their interest in the estate. Such sale, after a considerable correspondence, was finally consummated in a personal interview between the defendant and the nephew in Milwaukee, April 20, 1889. Three days afterwards, the defendant called upon Thomas, in New York, and told him he had bought out the Milwaukee and Cleveland heirs upon the terms mentioned, and offered to buy out his interest on the same terms. Thomas replied that he would do as his

sister Mary did, or that he would think it over, and probably do as Mary and Dennis advised. There is no claim that Thomas was informed as to the value of the lands so devised, nor that the defendant's attorney's fee of \$3,000 was contingent upon recovery. The defendant testified to the effect that he thinks he told Thomas of the arrangement which Dennis had made with his attorney, but such testimony is inconsistent, and far from being plausible. Besides, it is contrary to the whole tenor and effect of the testimony given by Thomas. According to his testimony, there was not a word said to him about contesting, nor that there was any plan to contest it. He also testified to the effect that the defendant intimated that the property did not amount to much; that a good deal of it was given to the authorities for a park. Under such circumstances, Thomas, through his sister's husband and Dennis, accepted the proposition so made to him by the defendant, nearly four months previously; and thereupon the defendant wrote Thomas, under date of August 7, 1889, to the effect that he would make out and forward papers for his signature, and pay the consideration upon delivery of the deed to the bank; that matters stood the same as when he was in New York; that little could be done unless all joined in a determined effort to secure their rights; and stating in a postscript, among other things, that "I enclose in deed all property filed in probate office, though *the better* part has unquestionably been sold and condemned." On cross-examination, the defendant quibbled about this statement, but virtually conceded that it was false, as written. This false statement in the letter corroborates the testimony of Thomas as to the conversation between him and the defendant. It is very important whether Thomas was induced to make the sale upon the representation that "the better part" of the lands had been sold and condemned, or that only "part" of the lands had been sold and condemned. It appears that the defendant put in evidence a supposed copy of the letter in

which the words "the better," in italics, were omitted, and that subsequently the plaintiff put in evidence the original letter; and that it was thereupon "agreed by the parties that the original letter to Thomas Dean, dated August 7, 1889, should be substituted for the copy." Nevertheless, the learned trial court, by some inadvertence, appears to have overlooked the fact, and so finds that the copy was the letter sent. Such is a general outline of the leading facts in evidence. We refrain from going into details, but are all constrained to believe that Thomas was induced to make the conveyance by the concealment, deceit and misrepresentation of the defendant and those acting in conjunction with him. This is the only question calling for consideration in the case. The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to enter judgment according to the prayer of the complaint.

Fraud, such as is relievable against in equity, may be apparent from the subject-matter of the bargain itself, where it is such as no man in his senses and not under delusion would make, on the one hand, and to which no honest and fair man would assent, on the other: *Story Eq. Juris.*, § 188. Where there is a bargain whose terms are such as to shock the natural sense of fairness, a court will find actual fraud on much slighter testimony than when the bargain does not grossly depart from what may be called business fairness. Mere inadequacy of consideration is not enough to call for equitable interposition: *Griffith v. Spratley*, 1 Cox, 383; *Collier v. Brown*, 1 Cox, 428; *Low v. Barchard*, 8 Ves. 133; *Western v. Russell*, 3 Ves. & B. 180; *Naylor v. Winch*, 1 S. & S. 565; *Osgood v. Franklin*, 2 John Ch. 1; *Borell v. Dann*, 2 Hare, 440; *Eyre v. Potter*, 15 How. 42; *Davidson v. Little*, 22 Pa. 245; *Harris v. Tyson*, 24 Ib. 347; *Mayo v. Carrington*, 19 Gratt. 74; *Wooley v. Drew*, 49 Mich. 290; but there may be such apparent unconscionableness or inadequacy as in itself to amount to a practical demonstration of fraud: *Home v. Wheldon*, 2 Ves. 516; *Huguemin v. Basley*, 14 Ib. 273; *Bromley v. Smith*, 26 Beav. 665; *Salter v.*

Bradshaw, *Ib.* 161; Croft *v.* Graham, 2 De G., J. & Sm. 155; Benyon *v.* Fitch, 35 Beav. 510; Aylesford *v.* Morris, L. R. 8 Ch. A. 490; Benyon *v.* Clark, 10 *Ib.* 389; O'Rourke *v.* Bolingbroke, L. R. 2 App. Cas. 814; Newell *v.* Snelling, L. R. 15 Ch. D. 679; Miller *v.* Cook, L. R. 10 Eq. 641; Tyler *v.* Black, 13 How. 231; Byers *v.* Surget, 19 *Ib.* 303; Butler *v.* Haskell, 4 Desau. 687; Barnett *v.* Spratt, 4 Ired. Eq. 171; Deaderick *v.* Watkins, 8 Humph. 520; Graham *v.* Pancoast, 30 Pa. 91; Howard *v.* Edgell, 17 Vt. 9. In a proper case, the court, in setting aside an unconscionable bargain, will, by its decree, secure to the defendant the amount actually advanced by him, with proper interest. See Tyler *v.* Yates, L. R. 11 Eq. 265 *aff'd* 6 C. A. 665; Aylesford *v.* Morris; Benyon *v.* Young, *supra*.

Concealment may amount to a fraud where it consists of the suppression of a material fact, which a party is in good faith bound to disclose: Tyler *v.* Savage, 143 U. S. 79. Mere silence on the part of a party to a contract does not, however, ordinarily amount to fraudulent concealment, as one party has no right to throw upon the other the burden of making him fully aware of what is for his interest: Peoples' Bank's Appeal, 93 Pa. 107; Pennybacker *v.* Laidley, 23 W. Va. 450; Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S. 383; Cleveland *v.* Richardson, 132 *Ib.* 318; Griel *v.* Lomax, 89 Ala. 420; Dambmann *v.* Schulting, 75 N. Y. 55, 85 *Ib.* 622; Graham *v.* Meyer, 99 *Ib.* 611; Wilde *v.* Gibson, 1 H. L. Cas. 605; Ralt *v.* White, 3 De G., J. & S. 360; Goninan *v.* Stephenson, 24 Wisc. 75; Hastings *v.* O'Donnell, 40 Cal. 148; (there are, however, exceptional cases, see Hanson *v.* Edgerly, 29 N. H. 343); and even if a question be put, the person questioned may maintain silence without being guilty of fraud, but if he speak at all he is bound to speak the truth: Frenzel *v.* Miller, 57 Ind. 1; Smith *v.* Countryman, 39 N. Y. 655; Patterson *v.* Kirkland, 34 Miss. 423; and it is held that where the vendor knows that the vendee is buying upon the faith of a statement made by a third party, which statement the vendor knows to be untrue, he is bound to inform the vendee of its falsity, for, by maintaining silence under the circumstances, he adopts the untrue statement as his own: Law *v.* Grant, 37 Wisc. 548; and there may even be circumstances in which a party may be held guilty of fraud by concealment, although he refuse

to give information when asked to formally commit himself: *Torrey v. Buck*, 1 Green Ch. 366; *Stoner's Admin. v. Wood*, 26 N. J. Eq. 418. Circumstances may well require disclosure of certain facts and then what seems to be mere silence will amount to fraudulent concealment. So where a vendor at the time of making and delivering a deed was secretly married it was held that it was his duty to disclose that fact: *Schiffer v. Dietz*, 83 N. Y. 300; and where a vendee bought land without disclosing to the owner that the vendee had already taken coal from under it without the vendor's knowledge, it was held that a case for equitable relief was established. Lord HATHERLY said: "The proposal which he makes is not in reality a simple proposal for the purchase of the property, it involves the buying up of rights which the owner has acquired against him and of which the owner is not aware. He is therefore bound to inform the owner of the circumstances of the case and is not at liberty to enter into a contract, without disclosing his commission of an act which has rendered him liable to certain consequences and of which act the person with whom he is dealing has a right to be informed in order to know what course he is to adopt." *Phillips v. Homfray*, L. R. 6 Ch. App. 770.

Where a party has made an incorrect statement, although honestly and with no intention of deceiving, if afterwards and before the consummation of the bargain based on the statement or if the circumstances are so altered to the knowledge of the party making the statement, and not to the knowledge of the party to whom it is made, the first party is bound to inform the other of the true state of affairs, or at least to make him aware that the statement is no longer a correct account of the real condition of affairs; his silence under such circumstances becomes a fraud: *Reynell v. Sprye*, 1 De G., M. & G. 660; *In re Scottish Petroleum Co.*, L. R. 23 Ch. D. 413; *Trail v. Baring*, 4 De G., J. & S. 318; 1 Beach Mod. Eq., § 93. Where artifice tending to prevent inquiry has been used, the person guilty of the trick will not be heard to allege that he was not bound to make disclosure. There is a wide difference between mere silence and active concealment: *Bank v. Campbell*, 75 Va. 455; *Stewart v. Wyoming Cattle Ranch Co.*, 124 U. S. 383; *Smith v. Countryman*, *supra*, and the test may be found in the answer to the

question whether one has intentionally produced a false impression upon the mind of the other party to the contract. If he have done so, it is immaterial whether it be by word or deed or by the concealment or suppression of material facts not within the knowledge of the other party: *Stewart v. Wyoming Ranch Co.*, *supra*; *Paullain v. Paullain*, 76 Ga. 420; *Morgan v. Dinger*, 23 Neb. 271; *Schiffer v. Dietz*, *supra*; *Phillips v. Homfray*, *supra*.

Fraud — Appeal — Deed — Consideration — Undue influence — Burden of proof.

TAYLOR v. CROCKETT.

(Supreme Court of Missouri, Division No. 1, June 19, 1894.)

In cases in equity the Supreme Court, on appeal, will review the facts; but, where the result turns upon the credibility of conflicting evidence, the court is disposed to give great weight to the findings of the trial judge.

The consideration of a deed is open to explanation upon an issue of fraud and undue influence in obtaining it.

A promise to pay taxes and to contribute to the support of the grantor, is *held* to be a sufficient consideration, in equity, to support the conveyance of the land in dispute in this case.

In a suit to set aside a deed, as obtained by undue influence and fraud, the burden of proof is upon the party charging such misconduct. The evidence in the present case reviewed, and *held* insufficient to establish that charge.

Appeal from Circuit Court, Jackson county, JOHN W. HENRY, Judge.

Action by Mary Taylor against one Crockett to set aside a deed. Judgment for defendant, and plaintiff appealed.

Kagy & Bremermann, for appellant.

Traber, Vandiver & McNeil, for respondent.

BARCLAY, J.—Plaintiff brought this suit to set aside a conveyance of certain land in Kansas City, Mo. The deed

attacked was made September 8, 1888, by plaintiff, Mary Taylor, and her husband, Adam Taylor (now deceased), to the defendant. The plaintiff's charge is that the deed was obtained by fraud, undue influence and imposition upon the grantors, and without a full understanding of its nature and meaning. This charge is denied by defendant. Her answer sets up the facts mentioned later in this opinion as her defense. Upon these facts plaintiff joined issue by a reply. The cause was tried by the court (Judge HENRY). A finding and decree for the defendant ensued. Plaintiff appealed.

As this is a case of equitable cognizance, we have reviewed the facts fully, and conclude that the learned trial judge was entirely right in the judgment he pronounced. The testimony establishes certain facts beyond controversy. It may be well to state them separately from the conflicting evidence on other phases of the case. Adam and Mary Taylor were husband and wife. In 1880 they acquired a piece of land in Kansas City, taking the title to both as grantees. The lot had a frontage of twenty-five feet on Lydia avenue, and ran thence eastward, of even width, about 160 feet to Grove street. September 8, 1888, plaintiff and Adam Taylor executed the deed in controversy to defendant, the sister of Adam. It was recorded November 3, 1888. It purported to convey the eastern portion of said lot, to a depth of ninety-five feet from Grove street, for the recited consideration of \$100. It was duly acknowledged by both grantors, and no question is raised as to its formal sufficiency. Both grantors signed by means of marks. Adam Taylor was then about eighty years of age, and was in feeble health, but it is not claimed that he was mentally incapable of contracting. On the contrary, plaintiff asserts the validity of a will made by him on the same day, and claims title under that will. By the will he devised and bequeathed to Mary all his property, real and personal. This will was admitted to probate in Jackson county in due

form, at plaintiff's instance, September 30, 1889, and is recorded there.

The rest of the case is composed of very conflicting accounts of the making of the deed and of the facts leading up to it. The plaintiff denied ever having executed or acknowledged it, or having authorized any one to sign it for her. She asserts that defendant never paid anything to Adam or herself as a consideration therefor. She admitted that defendant put a house on the land and had promised to take care of the old man, but asserted that defendant had never given him a cent for it. She declared that Adam wept when he learned that the land stood in defendant's name on the tax list. She admitted that she had put the will in a trunk and kept it. We do not undertake to give all the details of the evidence. A mere outline will be sufficient for the purpose of this appeal. Plaintiff's son by a former marriage testified on her behalf. He corroborated his mother on the point that she had originally furnished the consideration for the purchase of the land; that Adam had no means and was helpless, and an object of charity in his latter days; that Adam was surprised on learning that the land was on the tax list as defendant's; that defendant then said "she didn't do it;" and that the truth about the title was discovered after Adam died, when plaintiff tried to borrow money on the land to pay his funeral expenses. Two other witnesses testified on the part of plaintiff touching an interview between Adam and the defendant, when the latter said she had "never bothered Adam's business, and hadn't been to the court-house at all; never changed his deed," etc. This is the substance of plaintiff's case.

On the side of defendant, the court excluded her as a witness, even in regard to the alleged conversations by her with living witnesses who had testified thereto. We need not examine into the correctness of that ruling, as defendant did not appeal. The defendant's daughter, Sallie Crockett (a woman about twenty-four years of age), testified

that about 1886 she and her mother came to Kansas City, and shortly afterwards found Adam Taylor. The Crocketts were about to leave the city to go west; but Adam desired them to stay, and to assist in supporting him and in paying his taxes, offering in return to give them a place to live on his lot. Sallie was the chief support of her mother. She declined to agree to the proposed arrangement unless plaintiff and Adam would give her mother a deed to that part of the land they were to live on, so it would be certainly hers. Finally, after many long talks over the matter, that condition was agreed to. The plaintiff took part in these negotiations; and fully assented to the final agreement. Sallie then engaged an attorney, who came to the house and drew the deed now in dispute. The plaintiff at that time produced the older deed to her and her husband. From that the attorney was able to compose the description of the east part of the same property as it now appears in the deed to defendant. Plaintiff also pointed out to the attorney how the land was to be divided, and seemed greatly pleased at the bargain. The will of Adam Taylor was also drawn and executed at the same time, and plaintiff took charge of it. All this occurred a little more than a year before Adam died. Defendant went at once into the possession of the land, with the full knowledge and consent of plaintiff and her husband. She put two houses on it, fenced it, and has lived upon it ever since. Sallie, on behalf of her mother, paid the taxes, as shown by four several tax receipts produced at the trial, representing a total payment of \$55.90, and assisted in the support of the Taylors to the time of Adam's death. Until then there was no disagreement between plaintiff and defendant. On the contrary, their relations were entirely harmonious. The plaintiff went with Sallie when these tax payments occurred, and knew of the improvements as they were made. Sallie's account of the making of the instrument was fully sustained by the testimony of the attorney who drew the deed

and took the acknowledgments of the grantors. He testified positively that they fully understood the transaction; that he carefully explained it to them; that plaintiff expressed himself as pleased with the arrangement, and that the true consideration was the agreement already described, namely, to assist Adam Taylor in the matter of paying his taxes, and to contribute, as defendant was able, towards his support. Another witness, a nephew of defendant, corroborated Sallie's testimony in regard to the consent of plaintiff to the defendant's moving upon the land, and as to Adam's statement that he was going to give defendant a home on the property. That was the substance of the case.

The credibility of the very conflicting accounts of the principal transaction is the chief matter for determination in this controversy. On that point we would be disposed to give great weight to the findings of the learned trial judge—a jurist of great experience and knowledge. He had the advantage of seeing the various witnesses. But we have also examined the evidence with care, and are convinced that the decided preponderance in respect of credibility is with defendant. The plaintiff's story is incoherent, rambling and unsatisfactory. Her denials are somewhat too sweeping to be trustworthy, while the evidence for defendant furnishes a reasonable and natural account of the transaction. That defendant's daughter paid \$55.90 for general and special taxes, beginning with a payment, January 26, 1889, of \$42 for grading Nineteenth street, the tax receipts prove. The testimony of the attorney who was present when the deed was executed and who was not shown to have any interest other than a professional one in the controversy, completely refutes the plaintiff's statements concerning the circumstances of its execution. The fact that no money was paid when the deed passed is immaterial. The consideration of \$100, therein recited, was open to explanation. The promise to pay taxes and assist in supporting Adam was sufficient consideration for the con-

veyance in equity, while at law none was necessary to sustain the deed as an executed contract, if honestly obtained. The burden of proof was upon plaintiff to show some fraud or other facts invalidating the deed, and we think she has failed to discharge herself of that burden.

The case, however, does not appear to call for further comment. It is enough to say, in conclusion, that we are satisfied that the decree of the Circuit Court was right, and should be affirmed. It is so ordered.

BLACK, C. J., and BRACE and MACFARLANE, JJ., concur.

He who alleges fraud in order to obtain equitable relief, in cases in which a presumption of fraud does not arise from the relation of the parties, must establish the fraud by clear and satisfactory evidence: *Trenchard v. Wanley*, 2 P. Wms. 166; *Townsend v. Lowfield*, 1 Ves. 35; *Walker v. Symonds*, 3 Swanst. 61; *Lavassar v. Washburne*, 50 Wisc. 200; *Marksbury v. Taylor*, 18 Bush, 519; *Bryan v. Hitchcock*, 43 Md. 527; *Re Will of Vandevere*, 20 N. J. Eq. 463; *Wenstrom Consol. Dynamo & M. Co. v. Purnell*, 23 Atl. 134; *Richardson v. Walton*, 61 Fed. Rep. 535; and while equity will sometimes proceed upon a presumption of fraud, which might not be sufficient to sustain a verdict, yet it is thought that this is to be confined to cases in which the relations of the parties are of a confidential character, or in which one is in the power of the other. This seems to be the result of the authorities; but see *Smith v. Harrison*, 2 Heisk. 230; and, in any event, it is not sufficient even to create grave suspicions that fraud and undue influence *may* have been practiced. See *Marksbury v. Taylor*; *Bryan v. Hitchcock*, *supra*; 1 Beach, Mod. Eq. Jurisp., § 71.

Specific performance—Fraud—Compensation—Evidence.**GRAND TOWER & CAPE GIRARDEAU RAILROAD
COMPANY v. WALTON.**

(Supreme Court of Illinois, June 19, 1894.)

[Reported 150 Illinois, 428.]

Where a railroad company is authorized to take private property for a public use under its charter, the mode of procedure in Illinois is laid down in the statute entitled "Eminent Domain." The proceeding is one at law, and not in equity.

While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes where a bill is filed for that purpose alone, yet where the land-owner has been brought into a court of equity by a railroad company, after it has taken and appropriated the lands for its purposes, and it prays for a decree requiring the land-owner to convey the lands thus taken, the latter may insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined by a jury to be selected for that purpose.

Where a railway company has a valid contract for a deed for its right of way, a court of equity is the appropriate tribunal to decree a deed in pursuance of the contract. And when such relief is sought by an original bill, the land-owner may file his cross-bill, charging fraud in procuring the agreement upon which the company seeks a decree of specific performance.

Where an agreement to convey a strip of land for a railroad right of way over certain lands, fixing no definite line, was procured to be executed upon the representations and promises of the agents of the road that the road should be located along a definite and fixed line and along the bank of a slough, and, after the agreement to release the right of way was executed, the promises and representations were disregarded and the road was built on a different route, it was held that, owing to the fraud practiced by the railway company, a court of equity would not decree specific performance of the agreement, and that a cross-bill setting up fraud was not without equity.

Where a cross-bill is filed in a suit for the specific performance of a contract to make a deed, and the defendant files his cross-bill charging that the contract was procured by fraud and false promises and representations, this will clothe the court of equity with authority to adjudi-

cate upon these matters; and such court will have the right, if necessary, to do complete justice between the parties, and to settle and determine legal as well as equitable rights. In other words, when equity acquires jurisdiction it will retain the case, and settle all questions incident to the relief sought by the bill.

It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law on questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished.

Where parties have reduced their contract to writing, the rule is well settled that parol evidence is not admissible to vary or change the terms of the contract, but where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose.

Appeal from the Circuit Court of Union county: the Hon. JOSEPH P. ROBERTS, Judge, presiding.

Serena R. Walton, appellee, commenced an action at law in the Circuit Court of Union county, against the Grand Tower & Cape Girardeau Railroad Company, to recover damages resulting to her in consequence of the construction of the railroad over and across certain lands owned by her in Union county. After summons was served, the railroad company filed a bill in equity, against the plaintiff in the action, for an injunction to enjoin the prosecution of the action, and also set up the execution of the following contract by Serena A. Walton for the right of way, and asked for a specific performance thereof:

"Whereas, the Grand Tower & Cape Girardeau Railroad Company has been organized, and intend to construct a railroad from opposite Cape Girardeau to Grand Tower, through the counties of Alexander, Union and Jackson, state of Illinois:

"This contract witnesseth, that in consideration of one dollar, the receipt of which is hereby acknowledged, and in further consideration of the benefits that will accrue to me by reason of the construction of said contemplated railroad, I hereby agree, contract, covenant and bind myself to make to said company, after the construction of said railroad has been begun, a deed for the right of way one hundred feet,

wide the middle thereof to be the centre of the main track of said railroad, over, across and through the following described land, lying in the county of Union, in the state of Illinois, to wit: Southwest quarter of section twenty-five (25) and the Northeast quarter of section thirty-five (35) all in township thirteen (13) south, range three (3) west, all of which is in Union county, Illinois: with power to take all necessary ground, rock and dirt off and from said right of way, to build embankments and turnouts: Provided, however, that if the work of constructing said railroad between East Cape Girardeau and Grand Tower is not begun and carried on in good faith on or before May 1, 1889, and said railroad finished within one year, this contract to grant the right of way to be utterly null and void. I further agree and contract that the agents, servants and contractors of said company, employed to build said railroad, may enter upon the right of way hereby granted to begin work to construct the said railroad, although the deed to right of way is not made, as fully as if the deed had been made."

Serena A. Walton, put in an answer to the bill, in which she admitted the execution of the agreement set out in the bill. The answer also contained the following: "But this defendant expressly avers, and states the fact to be that the said agreement was entered into by her, and that she was induced to sign said agreement, by and through the fraud and misrepresentations of the complainant and its agents, in this, to wit: that at the time and before the signing of said contract it was expressly understood and stipulated and promised by the complainant and its agents that said railroad right of way mentioned in the agreement was to be located upon the east bank of a slough known as Dry or Big Slough, traversing the described lands in a northerly and southerly direction, said right of way to be upon the east bank of said slough where the right of way intersects the southern line of the defendant's said lands, and to be upon the east bank of said slough, not more than fifty feet

from the centre thereof with the west line of said right of way, said right of way extending in a northerly direction on the east bank of said slough with the salient points thereof, and leaving defendant's lands at the north side thereof at a point west of the house thereon situated, near the east bank of said slough. This defendant, further answering, denies that the complainant began and carried on the work of constructing the said railroad in pursuance of the terms of the said agreement in good faith, or has in any respect complied with the terms of said agreement, but, on the contrary, states the fact to be that the said complainant, in direct violation of the agreement and understanding, did build and construct said railroad and locate its said right of way far to the east of said east bank, to wit: a distance of two hundred feet to five hundred feet in the middle of, or near the middle of, defendant's said lands. This defendant denies that said railroad is built upon and across the land agreed to be conveyed by the defendant, and also denies that the complainant is entitled to a deed for said right of way under said agreement. This defendant admits that she has refused to make a deed to said right of way as described in complainant's bill, and admits that she has brought a suit at law in this court, suing for damages and for the value of the land described in complainant's bill."

The defendant, Serena A. Walton, also filed a cross-bill in which she set up the same facts contained in the answer, and also that she had forbidden said company and its agents to proceed with the work as it progressed, and praying as relief that the said agreement be declared null and void, and that the court decree payment for the land taken and damaged. The cross-bill also prayed for general relief.

At the request of the complainant in the cross-bill the following questions of fact were ordered by the court submitted for trial by jury: First, did the defendant in the cross-bill, at the time it secured the right of way over complainant's land, promise the complainant, and agree with

her to build its road on the east bank of Dry slough? second, did the defendant in the cross-bill build its road over complainant's land where it promised to build it? third, what was the value of the land actually taken by said defendant? fourth, what was the damage to complainant's land over and above the benefits, if any?

To the first question the jury answered, Yes; to the second they answered, No. The value of the land taken, they found to be \$520. The damage to the lands, over and above the benefits, they found to be \$775. The jury also returned in answer to a question as to the amount of land actually taken by the railroad, that the number of acres was $13 \frac{4}{100}$.

Upon the return of the verdict, the court entered a decree, in effect, that the equities of the case are not with the complainant in the original bill, and they are with the complainant in the cross-bill; that the original bill be dismissed; that the complainant in the cross-bill recover from said railroad company the sum of \$1,295, and costs of suit, and that execution issue therefor; that on payment in full of said amount, the title in fee simple to a tract of land one hundred feet wide, the centre being the centre of the railroad track across the southwest quarter of section 25, the southeast quarter of section 26, and the northeast quarter of section 35, township 13 south, range 3 west of the third principal meridian, vest in said defendant, its grantees and successors.

Isaac Clements, F. M. Youngblood and W. W. Barr, for the appellant.—In a chancery proceeding the relief sought must be equitable relief, and this must appear on the face of the bill. This rule applies to a cross-bill as well as to an original bill: *Story's Eq. Pl.*, § 398; *Cooper's Eq. Pl.* 86; *Jones v. Smith*, 14 Ill. 229; *Quick v. Lemon*, 105 Ib. 578.

When a court of equity once acquires jurisdiction it will

retain the case, and give complete justice between the parties. But the legal relief must be incidental to the equitable relief sought in the same bill: Story's Eq. Jur., § 74 b.; *Tunesma v. Schuttler*, 114 Ill. 156; *Robinson v. Appleton*, 124 Ib. 276.

If the equitable relief fail, the legal relief must fail with it. It can only be re-adjusted as an incident to the principal relief sought—the equitable relief: *Daniel v. Green*, 42 Ill. 471; *Green v. Spring*, 43 Ib. 280; *County of Cook v. Davis*, 143 Ib. 151.

A false representation, within the meaning of the law, must be as to a past or present state of facts—not merely as to an intention as to the future: Kerr on Fraud and Mistake, 88; Fry on Specific Per., § 101; *Haeni v. Bleisch*, 146 Ill. 262; *Gallaher v. Brunell*, 6 Conn. 346.

It is a general rule that parol evidence cannot be admitted to contradict, add to, subtract from or vary the terms of a written contract: 1 Greenleaf on Evidence, § 275; 2 Phillips on Evidence, 637; *Lighthall v. Colwell*, 56 Ill. 108; *Gibbons v. Bressler*, 61 Ib. 110; *Packard v. Van Schoick*, 58 Ib. 79; *Strehl v. D'Evers*, 66 Ib. 77; *Tiernan v. Granger*, 65 Ib. 351; *Coey v. Lehman*, 79 Ib. 173; *Fowler v. Black*, 136 Ib. 363.

Taylor Dodd and Karraker & Lingle, for the appellee.—The cross-bill, expressly and in substance, charges fraud. Courts of equity and law have concurrent jurisdiction of fraud. Where a court of equity has concurrent jurisdiction with a court of law, the court which first acquires jurisdiction must hold and exercise it until the litigation is ended: *Whitney v. Stevens*, 97 Ill. 482.

Appellant now argues that the court had no jurisdiction upon the ground that there is a complete remedy at law. The record shows that the merits of the cross-bill were put in issue by answer, and a trial had thereon. Where respondents to a bill answer to the merits and submit to the

jurisdiction of the court, they cannot afterwards raise the question of jurisdiction: *Schmol v. Fiddick*, 34 Ill. App. 199.

Except in cases where the subject-matter is wholly foreign to the jurisdiction of a court of equity, the objection that there is an adequate remedy at law must be raised and urged in the court below, or it will be considered as waived: *Comstock v. Henneberry*, 66 Ill. 212.

The general rule that equity will not grant relief in cases in which the party has a complete remedy at law, has its exceptions in cases of concurrent jurisdiction, in fraud and imposition. Something more than the bare fact that there is a remedy at law is required. The remedy at law must not only appear clear, and not doubtful or difficult, but the remedy there must be as effectual as in equity: *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ib. 46.

Legal rights may be cognizable in equity. If there are equitable conditions authorizing the court to act, it will, to do complete justice, enforce legal as well as equitable rights: *Tunesma v. Schuttler*, 114 Ill. 163.

Equity acquiring jurisdiction, retains the case to settle all questions incident to the principal relief sought (*Robinson v. Appleton*, 124 Ill. 281), or for all purposes germane to the subject-matter of the original bill, although some such matters have ceased to be in contention: *Hurd v. Ascherman*, 117 Ill. 504.

A court of equity having acquired jurisdiction for one purpose will entertain it for all purposes: *Pratt v. Kendig*, 128 Ill. 302.

When fraud is charged in procuring the execution of a written contract, parol evidence is admissible: *Renshaw v. Gans*, 7 Pa. 117; *Murray v. Duke*, 46 Cal. 644; *Neil v. Speigle*, 33 Ark. 63; *Razor v. Razor*, 39 Ill. App. 529; 2 *Wharton on Evidence*, § 1026; 2 *Taylor on Evidence*, § 1028.

CRAIG, J. (after stating the facts).—It is first claimed by the railroad company that the court had no jurisdiction to

grant the relief sought by the cross-bill ; that the remedy is cognizable only at law. Where a railroad company is authorized to take private property for a public use, under its charter, the mode of procedure is laid down in our statute entitled "Eminent Domain." Under that statute, private property cannot be taken or destroyed without just compensation. Such compensation is required to be ascertained by a jury. Where the parties cannot agree upon the amount to be paid, the party authorized to take private property is required to apply to the judge of the circuit or county court, either in vacation or term time, by petition setting forth his or her authority in the premises, the purpose for which said property is sought to be taken or destroyed, a description of the property, the names of all persons interested therein, etc. The statute provides for service of process, and for calling a jury, before whom the question of just compensation shall be tried. The proceeding authorized is one at law. In this case, as has been seen, the amount the land-owner was entitled to recover was determined in equity. In the first place, however, the land-owner brought an action at law, but the defendant in that action, the railroad company, filed a bill in equity to enjoin its prosecution, and prayed for a specific performance of an alleged agreement, in which the land-owner had agreed, upon certain terms and conditions, to convey the right of way. The jurisdiction of a court of equity was thus invoked by the railroad company. It sought a decree compelling the land-owner to convey to it the right of way over certain lands owned by her, which the railroad company had taken for its right of way. While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes, when a bill has been filed for that purpose alone, yet when a land-owner has been brought into a court of equity by the railroad company after it has taken and appropriated the lands for railroad purposes, and it prays

for a decree requiring the land-owner to convey the lands thus taken, may not the land-owner insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined, as was done here? The cross-bill, in express terms, charged the complainant in the original bill with fraud in procuring the agreement upon which it predicated its bill for a specific performance. It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law on questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished. If, therefore, the agreement was procured by fraud, no reason is perceived why a court of equity might not investigate that question, and grant such relief as the equity of the transaction demanded. So, also, if the complainant, the railroad company, held a valid contract for a deed for the right of way, a court of equity was the appropriate tribunal to decree a deed in pursuance of the contract. Thus it appears that a court of equity had jurisdiction of the relief prayed for in the bill, and it also had jurisdiction of the question of fraud presented by the cross-bill. Being clothed with authority to adjudicate upon these matters, the court had the right, if necessary, to do complete justice between the parties—to settle and determine legal as well as equitable rights, as held in *Tunesma v. Shuttler*, 114 Ill. 164, 28 N. E. 605. The rule seems to be well established that where equity acquires jurisdiction, it will retain the case, and settle all questions incident to the relief sought in the bill. *Stickney v. Gondy*, 132 Ill. 213, 23 N. E. 1034, is a case in point. It is there said: "When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason if the controversy contains any equitable feature, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means

of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal remedies which would otherwise be beyond the scope of its authority."

But it is claimed that appellee was not entitled to equitable relief and a failure to establish equitable relief precluded a recovery of compensation for the land taken. It will be remembered that the contract signed by appellee, in which she agreed to convey the right of way, is silent in regard to the land upon which the road should be constructed; and appellee claims that a definite line was agreed upon between her and the agent of the railroad company before she signed the agreement, and the road was to be located on that line, and that the agreement for a release of the right of way was executed in the faith of the agent. It appears that there was a slough, known as "Dry Slough" running through appellee's lands, and appellee's son, who was in charge of her lands at the time, desired the road to be located on the banks of that slough. Martin D. Walton testified that he had charge of the land. In February, 1889, he met Captain Nesmith, assistant engineer, and others, to confer about the right of way. At that time a preliminary survey had been made. He testified: "I knew where it run. I told them then that in order to get the right of way they would have to be on the bank of the slough when they struck our farm from the south side, and keep the slough bank, and go out west of the house, at the north side of the farm. The engineer, Captain Nesmith, said that he knew exactly where I meant, and it was just about as good a location for the road, and much better for the farm. We agreed to meet up here at town the next day, and give them the right of way, with the understanding that they would make that change. I had a conversation with my mother before she signed the agreement. I told her that they had agreed to place the road on the bank

of the slough, where I wanted it, and repeated to her what the captain said about that being the place for the road." Mrs. S. A. Walton testified: "I asked him (Mr. Nesmith) who represented the company, and who would be responsible for where the road went. Mr. Nesmith said he was. I told him I would not sign it if he did not put it where Winstead wanted it. Mr. Nesmith promised to put it where Winstead wanted it. I wouldn't have signed it if he had not promised it. Mr. Nesmith knew where the road was to go. We all understood it. He said that there's where they would put it, because it would be as much to their advantage as mine. I did not give my consent to the company to locate the road where they did. My consent was only for it to go up the slough." Edward B. Walton testified: "Was present when my mother signed the agreement. Mr. Nesmith said it was to be up the slough bank, fifty feet from the centre of the slough, or about that. A survey had been made, and Nesmith had a plat with him. It showed the line out in the field, but he (Nesmith) said that did not make any difference about where it showed it, but said they would go up the slough bank." There is other evidence in the record bearing on this question. Nesmith, the assistant engineer, who was acting for the railroad company, confirms the evidence of the appellee and her sons. Among other things, he testified: "Was detailed to go with citizens' committee to assist in procuring right of way. With them, visited the complainant. The preliminary survey had been made at that time, and think the plat was shown her. The complainant wished the line of the road to be as nearly on the bank of the slough as possible, and I told her that I was instructed to change the line, keeping as near the Dry slough as possible without using reversed curves."

From the evidence, it is plain that appellee executed the agreement to release the right of way with the understanding and upon the express agreement of the railway com-

pany that the line of road should be changed, and that it should be located through her farm on the banks of the Dry slough. But after the written release was obtained, the promises and agreement upon which it was obtained were disregarded, and the road was constructed on a different route; and the railroad company now seeks, in a court of equity, to compel the execution of a deed conveying the right of way for lands appellee never agreed to convey. The agreement for the right of way was obtained upon the express representation of Nesmith, the agent of the railroad company, that the line of the road would be changed so that it would conform to her wishes, and be located along the line of the Dry slough. If this representation had not been made the release would not have been executed. The engineer testified that it would have been better engineering to have placed the road as nearly on the bank of the slough as possible without using reversed curves. This was not, however, done, and the evidence would seem to justify the conclusion that the railroad company did not intend to perform its agreement to change the location of the road at the time it was made. There is some evidence in the record that the route along the slough was impracticable, but the testimony of Nesmith in this regard is not overcome.

It is, however, claimed that the representation made to appellee establishes only a future intention on the part of the railway company to make the change of route; and, it is said, a representation, although it may be false, as to a matter of intention, does not constitute fraud; and in support of this position we are referred to Kerr on Fraud and Mistake (page 88), where the author says: "As distinguished from a false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it afford grounds for relief in equity." It is, however, plain that the representations here involved do not fall within the rule indicated by

the author. Here was an agreement to locate the road at a definite, specified place, on the part of the railroad company. It was not a mere statement of an intention to do an act in the future, but a contract to change the location, in consideration of which the appellee agreed to give the right of way.

It is also claimed that parol evidence was not admissible to vary or change the terms of the written contract executed by appellee. Where parties have reduced their contract to writing, the rule is well established that parol evidence is not admissible to vary or change the terms of the contract. But this rule of evidence has no application here. Where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose: *Van Buskirk v. Day*, 32 Ill. 260; *Race v. Weston*, 86 Ill. 92; *Wilson v. Haecker*, 85 Ill. 352. This rule is well established.

Complaint is also made in regard to the amount of damages recovered by appellee, but, upon examination of the record, we find the decree sustained by the evidence. Indeed, under the evidence, a much larger amount might have been found by the jury. Moreover the theory upon which the damages were assessed was so favorable to appellant that it is in no position to complain. The court held—and on this theory the damages were assessed—that inasmuch as appellee had given the railroad company the right of way over her lands on a certain line, and the company having selected a different route, appellee was only entitled to recover the difference in damages, if any, between the two routes. The decree of the Circuit Court will be affirmed. Affirmed.

Compensation may be added as a condition of a decree for specific performance when the equity of the case requires it: *Beach Mod. Eq. Juris.*, § 624; *Bispham Eq.*, §§ 388, 389; *Adams Eq.* 89, 90; *Adams v. Messinger*, 147 Mass. 185; *Vaughts v. Cain*, 31

W. Va. 424; *Towner v. Tickner*, 112 Ill. 217; *Contract of Fawcett and Holmes*, L. R. 42 Ch. D. 150; *Stevenson v. Polk*, 71 Iowa, 278; *King v. Bardeau*, 6 Johns. Ch. 38; *Harbers v. Gadsden*, 6 Rich. Eq. 284. The rule has been applied generally to cases of mistake, see *Fry Spec. Pref.*, § 753 (ed. 1892), where the plaintiff is willing to make reasonable compensation: *London & Birmingham R. R. v. Winter*, Cr. & Ph. 57; *McKenzie v. Hesketh*, 7 Ch. D. 675; or where the vendor has contracted to convey more than he has, and the purchaser, as plaintiff, is willing to take what the vendor can convey, with suitable compensation for the deficiency: see *Mortlock v. Buller*, 10 Ves. 315; *Mulligan v. Cooke*, 16 Ves. 1; *Dale v. Lister*, cited 16 Ves. 7; *Att'y-Gen. v. Day*, 1 Ves. 218; *Westen v. Russell*, 3 V. & B. 187; *Hooper v. Smart*, L. R. 18 Eq. 683; 2 *White & Tudor* L. C. Eq. 586 *et seq.*; *Burrow v. Scammell*, 19 Ch. D. 175; *Hughes v. Jones*, 3 De G., F. & J. 315; *Sutherland v. Briggs*, 1 Hare, 26; *Wilson v. Williams*, 3 Jur. N. S. 810; *Neale v. Mackenzie*, 1 Keen, 474; *Bennett v. Fowler*, 2 Beav. 302; *Jones v. Evans*, 17 L. J. Ch. 469; *Leslie v. Crommelin*, I. R. 2 Eq. 134; *Morss v. Elmendorf*, 11 Paige, 287; and see *Megie v. Bennett*, 51 N. J. Eq. 281. The present case seems to go farther than the above, for here the ground of compensation rested on the acquirement of jurisdiction on account of the fraud of the plaintiff; but there seems to be no reason why the vendor, if so disposed, may not waive his right to a rescission of the contract, on the ground of fraud, and permit its enforcement, upon receiving compensation. He is not bound to take advantage of the extreme penalty of rescission. The statement in *Fry Spec. Pref.*, § 1252 (ed. 1892): "The principle of compensation, whether arising under the general doctrines of the court or under a condition for compensation in case of any error or misstatement, will not be applied when there has been misrepresentation, even, it seems, though the difference be of such character that if it had arisen from mere error, it would have been subject to compensation, as, for instance, in respect of the difference between copyholds nearly equal in value to freeholds, and freeholds" (in support of which are cited *Clermont v. Tasburgh*, 1 J. & W. 119; *Duke of Norfolk v. Worthy*, 1 Camp. 337, 340; *Powell v. Doubble*, Sug. Vend. 23; *Stewart v. Alliston*,

1 Mer. 26; *Price v. Macaulay*, 2 De G., M. & G. 339, 344; *Leyland v. Illingworth*, 2 De G., F. & J. 248; *Lachlan v. Reynolds, Kay*, 52; *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Re Terry and White*, 32 Ch. D. 29) must be restricted to cases in which the party guilty of making the misrepresentations seeks specific performance and offers compensation. *Powell v. Elliot*, L. R. 10 Ch. 424, which has been cited, baldly, as showing a decree for specific performance on a bill filed by vendor and a cross-bill by vendee praying rescission, does not conflict with this restriction as is shown by the following extract from the close of the opinion of Lord CAIRNS in the Court of Appeal: "The substance of the case between the parties was this: the vendors insisted that they were entitled to specific performance without any abatement; the purchasers insisted that they were entitled in the alternative to either rescission or abatement, and for the determination of that issue it was considered at the hearing necessary to have the matter further inquired into. The result of that inquiry has been to establish that the purchasers are entitled to a very substantial abatement."

A vendor cannot be required to convey a different parcel of land from that which he has agreed to convey: *Bisph. Eq.*, § 390; *Sugd. V. & P.* 316; *Castle v. Wilkinson*, L. R. 5 Ch. 534. A case in which equity has gone very far to relieve a vendor from the consequences of his own mistake, innocently made, when to have taken advantage of it would have verged very closely on fraud, is *Pratt v. Bowman*, 37 W. Va. 715, where an executor had ignorantly sold a tract containing one hundred and forty acres, when in fact it contained two hundred and fifty-five acres. The court put the purchaser to an election between a rescission and payment of compensation for the excess of land over the one hundred and forty acres.

A bill will not be entertained for compensation except as incidental to other relief: *Story Eq. Jur.*, § 798.

Reformation of contract—Laches—Parol evidence.**METROPOLITAN LUMBER CO. v. LAKE SUPERIOR
SHIP-CANAL, RAILWAY & IRON CO. ET AL.**

(Supreme Court of Michigan, September 25, 1894.)

It is no defense to an action to correct a contract for the purchase of lumber, by including land omitted therefrom by mistake, that the action was not commenced until some time after the discovery of the mistake by the vendee, when immediately on its discovery the vendee notified the vendor that he intended to insist on his right to the land omitted, and no injury was caused to the vendor by the delay.

In an action to correct a contract for the purchase of lumber, by including land omitted therefrom by mistake, where the vendee has made a payment under the contract, and has commenced to remove lumber from the land therein described, oral evidence is admissible to show that it was the intention of the parties to include the land claimed to have been omitted.

Appeal from Circuit Court, Iron county, in chancery ;
JOHN W. STONE, Judge.

Bill by the Metropolitan Lumber Company against the Lake Superior Ship-Canal, Railway & Iron Company and others. From a decree for complainant, defendants appealed.

Ball & Ball, for appellants.

Mend & Jennings (*E. E. Osborn*, of counsel), for appellee.

HOOKEE, J.—Complainant's bill is filed to correct a contract for the purchase of timber, by adding to it the description of certain land which is claimed to have been omitted by mistake. The negotiations took place in Chicago, between the presidents of the corporations, complainant and defendant. The contract conveying the timber was subsequently prepared by defendants' counsel in Michigan, and was afterwards signed by the respective parties. Upon discovering the omission, which discovery was made some

time after the contract was signed by complainant's president, defendants were asked to correct the mistake, but declined to do so without suit. Some time afterwards this suit was instituted. The learned circuit judge who heard the cause filed a written opinion, in which he quotes the testimony at length, which we think is as fair a review of the case as could be made. We agree with him that the evidence shows that the parties who negotiated the deal both understood that the "Perch Lake Group" of lands was included in the purchase. It appears to have been omitted because defendants' president, Mr. Davis, did not specifically mention it in his telegram of instructions, if it can be called such, which he sent to Mr. Longyear, who was agent for the defendants at Marquette, from whom the attorney received the information upon which he prepared the contract. The telegram read as follows, viz.: "Chicago, June 6, 188 . J. M. Longyear: Have sold to Atkinson all groups under refusal to him; also the Felch group. [Signed] Theo. M. Davis." It appears that complainant had written options on all the land covered by the negotiations, except the Felch group and the Perch lake group. The latter, not being mentioned in the telegram, was omitted. All of the witnesses who were present at the Chicago interview agree that this group was talked about, and specifically mentioned as one of the tracts to be included. Davis himself concedes this, but claims that he was figuring upon the basis of the amount of timber upon the groups for which the complainant had written options, and that he supposed the Perch lake group was one of these. He admitted, however, that he consented to take \$500,000 for the timber, exclusive of the Perch lake group, and that he asked \$250,000 for that. As these sums aggregate \$750,000, the exact amount paid, there seems little doubt of the justice of complainant's claim. We are satisfied that the complainant is justly entitled to relief.

It remains to inquire whether there is any legal obstacle

to granting it. It is opposed upon several grounds, viz. : (1) The mistake was not mutual. (2) The mistake on part of complainant was committed through gross negligence, and equity will not relieve in such cases. (3) Delay in attempting to enforce complainant's claim, and going on to carry out the contract after refusal by the defendants to correct the contract, until it was impossible to put the parties in *statu quo*, constitutes a waiver of complainant's claim. (4) The addition of more land to the description, upon evidence of a parol contract, is contrary to the statute of frauds. We are satisfied that the omission was the result of the mistake of defendants' president in sending the telegram, supposing it to be full enough to cover the Perch lake group. There is no reason to believe that he intentionally caused this omission. We cannot accede to the proposition that complainant's president was so negligent in executing the contract without discovering the omission as to deprive the complainant of property worth \$250,000. He had no reason to anticipate an attempt to cheat his company, and, therefore, had no occasion to be more than ordinarily careful. He was dealing with a concern whose business was methodically conducted, and he knew that it was in possession of accurate descriptions. The contract was drawn by a reputable and able lawyer. To hold that he was negligent would be to say that acceptance of a deed or writing without a comparison and verification of descriptions is such negligence as to preclude relief against mistake, no matter how serious the consequences. Atkinson died before these proceedings were commenced, and we have not the light that his testimony might throw upon the question of caution. From the testimony of Mr. Barrett, one of the defendants' witnesses, it would seem that he took the trouble to bring the contract to defendants' office to make a comparison of the descriptions, which was done, and he went away satisfied. During this time he was ill with a malady from which he died soon after. The claim that a mistake had

been made was asserted as soon as it was discovered, and it was insisted on at all times afterwards. It is true that suit was not immediately commenced, but complainant never gave the defendants reason to suppose that it had abandoned or intended to waive its claim. No injury resulted to the defendants from the delay, and the complainant was justified in exhausting persuasion before resorting to litigation, especially in view of Davis's repeated admission that he understood the Perch lake land a part of that contract. It is strenuously urged that the statute of frauds precludes the relief sought by complainant, the negotiations having been oral. There is a conflict in the books upon the question of the effect of the statute of frauds upon the jurisdiction of courts of equity to reform instruments, made in pursuance of oral agreements, where the correction sought is the addition of lands to those described. We are referred to the case of *Macomber v. Peckham*, 16 R. I. 485, 19 Atl. 910, as a recent adjudication upon the subject, and to *Climer v. Hovey*, 15 Mich. 18, in support of defendants' contention. In the former case the court was careful to withhold an opinion beyond what was required by the facts before it. In stating the facts, DUFFEE, C. J., says: "Nor is it a case in which it is claimed that the contract is taken out of the operation of the statute of frauds by part performance on the part of the complainant. It presents the naked question whether oral testimony will be received in equity for the purpose of reforming a written contract for the sale of real estate on the ground of mutual mistake, and of enforcing it specifically when reformed." Opposed to this case is that of *Hitchins v. Pettingill*, 58 N. H. 386, decided eleven years earlier by the Supreme Court of the state of New Hampshire, which was not noticed by the Rhode Island court. It was there held that "when reformation is sought of a deed which, through fraud or mistake, conveys less land than was orally bought and paid for, the case does not stand as if there were no deed, and the error may be corrected without

proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed." Many cases are cited in the opinion as supporting this proposition. This subject is also thoroughly considered in the notes to *Woollam v. Hearn*, 2 White & T. Lead. Cas. Eq. 1008 *et seq.* The case of *Climer v. Hovey*, 15 Mich. 18, like the Rhode Island case, was one where the parties had not acted under the contract. In the language of CAMPBELL, J.: "No payments are alleged, and no acts of part performance. We are, therefore, brought down to the simple inquiry whether mere mistake, when neither party has parted with or done anything beyond signing an executory contract for one description of land, can authorize the court of chancery to enforce a parol contract by applying the terms written concerning one estate to another not referred to in writing." The bill was dismissed, Mr. Justice CAMPBELL basing his opinion upon the fact that nothing had been done under the contract, and that it was, therefore, within the operation of the statute of frauds. Chief Justice MARTIN concurred in the result. Mr. Justice COOLEY reserved his opinion as to the power of the court to correct a mistake in a suit to enforce it, concurring upon other grounds, and with him Mr. Justice CHRISTIANCY concurred. But, whatever may be the rule where nothing has been done under the oral contract, we think that in this country the overwhelming weight of authority supports the jurisdiction where part performance is shown, sufficient to warrant a specific performance under an oral contract. In this case a payment was made and the purchaser proceeded to lumber the tracts not in dispute before the omission was discovered, as was the case in *Hitchins v. Pettingill*, above cited. The case of *Toll v. Davenport*, 74 Mich. 397, 42 N. W. 63, appears to recognize the jurisdiction of chancery in such cases when a parcel was omitted from a mortgage, relief being denied, for the reason that the rights of a *bona fide* purchaser intervened. In the later

case of *Kimble v. Harrington*, 91 Mich. 281, 51 N. W. 936, a mortgage was reformed by the insertion of the description of a forty-acre parcel a mile distant, which was omitted by mistake. The decree of the Circuit Court will be affirmed, with costs. The other justices concurred.

The English authorities tend to the conclusion that where reformation and enforcement of a written contract are sought in equity and there has been no part fulfillment of the contract, a contract within the statute of frauds cannot be reformed upon parol testimony: *Lawson v. Laude*, 1 Dick. 346; *Fell v. Chamberlain*, 2 Ib. 484; *Jenkinson v. Pepys*, cited 1 V. & B. 528; 15 Ves. 521; *Higginson v. Horne*, 3 Hare, 276; *Earl of Darnley v. Proprietors of the London, Chatham & Dover Ry.*, L. R. 2 H. L. 43; *Snelling v. Thomas*, L. R. 17 Eq. 303; *Clinan v. Cook*, 1 Sch. & Lef. 22; *Woollam v. Hearn*, 7 Ves. 211; and see *Martin v. Pyatt*, 2 De G., M. & G. 785; *London & Birmingham R. R. Co. v. Winter*, 1 Cr. & Ph. 57. This rule has been followed in some cases in the United States, and perhaps the strongest statement in its favor is that by CAMPBELL, J., in *Climer v. Hovey*, 15 Mich. 18, in which case the court drew a line of demarcation between cases in which the reformation sought took the shape of striking out terms or subjects, which it held did not violate the statute of frauds, because the whole residuary agreement remained in writing, and those in which it took the form of addition; as to cases of this latter class, the learned judge said: "But every parcel of land or interest imported into a contract, which does not refer in any way thereto, must be thus affected by unwritten stipulations and the attempt to do this is nothing else than an attempt to put parol agreements on the same footing with writings. Where equitable circumstances are made the basis of action, the courts, if they give relief, do it on the ground that the case is thereby taken out of the statute. But where the case stands on no such equities the statute must apply or must become of very little service." See *Glass v. Hubbert*, 102 Mass. 25; *Macomber v. Peckham* 16 R. I. 485; *Elder v. Elder*, 10 Me. 80; *Jordan v. Fay*, 40 Ib. 130; but the English rule is not here generally followed, the current of authority

being the other way : *Gillespie v. Moon*, 2 John. Ch. 585 ; *Beardsley v. Duntley*, 69 N. Y. 584 ; *Hitchins v. Pettingill*, 58 N. H. 386 ; *Noel's Exr. v. Gill*, 84 Ky. 241 ; *Olson v. Erickson*, 42 Minn. 440 ; *Moore v. Hazlewood*, 67 Tex. 624 ; *Dod v. Paul*, 43 N. J. Eq. 302 ; *Creigh's Adm'r. v. Boggs*, 19 W. Va. 240 ; *Bradford v. Union Bank*, 13 How. 57 ; *Mosby v. Wall*, 23 Miss. 81 ; *Tilton v. Tilton*, 9 N. H. 385 ; *Philpott v. Elliott*, 4 Md. Ch. 273 ; *Wall v. Arlington*, 13 Ga. 88 ; *Utterson Lumber Co. v. Rennie*, 21 Can. S. C. 218. Where, however, acts have been done in pursuance of an agreement and which of themselves manifest the existence of a parol contract, which was part of the contract which the written contract professes to embody, a decree may be made for specific performance of the written contract with the variation shown by parol : *Legal v. Miller*, 2 Ves. 299 ; *Pitcairn v. Ogbourne*, Ib. 375 ; *Lanyon v. Martin*, 13 L. R. Ire. 297 ; *McCue v. Johnson*, 25 Pa. 306 ; *Parker v. Parker*, 1 Gray, 409 ; *Hardeley v. Richardson*, 44 Md. 617 ; *Gibney v. Burmaster*, 53 Pa. 332 ; *Miller v. Ball*, 64 N. Y. 286 ; *Cannon v. Collins*, 3 Del. Ch. 132 ; *Parke v. Lee-wright*, 20 Mo. 35 ; *Galbraith v. Galbraith*, 5 Kan. 402 ; *Sweenly v. O'Hara*, 43 Mo. 26 ; *Arguello v. Edinger*, 10 Cal. 150.

Reformation of Deed—Mistake.

PURVINES ET AL. v. HARRISON.

(Supreme Court of Illinois, June 16, 1894.)

[Reported 151 Illinois, 219.]

To justify the reformation of a written instrument upon the ground of mistake, it is necessary, first, that the mistake should be one of fact and not of law ; second, that the mistake should be proved by clear and convincing evidence ; and third, that the mistake should be mutual and common to both parties to the instrument.

A mistake of law is an erroneous conclusion as to the legal effect of known facts, the construction of words being a matter of law. Where parties instruct a draughtsman to prepare a quit-claim deed for their execution, but he draws a deed containing language which amounts in law to a covenant of title in fee and they sign the deed knowing that such language is in it, they will be held to have been mistaken in the law, that

is to say, in the legal effect of the language used and in the legal consequences of retaining such language in the deed.

Mistake of fact has been defined to be a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in an unconscious ignorance or forgetfulness of a fact past or present, material to the contract, or belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of a thing which has not existed.

Where a woman employed a scrivener to draw a deed from her to her son to convey to him a tract of land with a reservation of a life estate in her, and it appeared that the conveyance was a gift and that the mother reposed great confidence in the son, and that, by inadvertence or mistake, the words reserving a life estate were omitted so as to convey the land absolutely in fee and that the son in his lifetime on discovery of the mistake, promised to correct the deed, it was held that a court of equity would reform the deed so as reserve to the grantor a life estate.

Where the relation of the parties is one of confidence, as that between mother and son, and the party executing the deed has a failing or weak mind arising from suffering or old age, the same degree of vigilance and care is not expected or required as is required in the ordinary dealings of men with each other, to authorize the reformation of a deed. The burden of proof is upon the party alleging the mistake to show the mistake is mutual.

It is well settled, that parol proof may be received to show a mistake in a deed, or other written instrument. The mistake may be shown by the admissions of the party in whose favor it has been made.

Writ of error to the Circuit Court of Sangamon county ;
the Hon. J. A. CREIGHTON, Judge, presiding.

Conkling & Crout, for the plaintiffs in error.—Where an act is sought to be avoided on the ground of mental incapacity on the part of one who did it, the burden of proof is on the party alleging the incapacity. Sanity is presumed : *Chicago W. D. Ry. Co. v. Mills*, 91 Ill. 39, and cases cited ; *McCarty v. Kearnan*, 86 Ib. 291.

A person capable of understanding the ordinary affairs of life is *compos mentis* : *Baldwin v. Dunton*, 40 Ill. 188 ; *Bart v. Quisenberry*, 132 Ib. 385, and cases cited.

Evidence of a mistake must be clear, convincing and satisfactory, in order to change a writing : *Kuchenbeiser et al. v. Beckert et al.*, 41 Ill. 172 ; *Mills v. Lockwood*, 42 Ib.

111; *Hunter v. Bilyeu*, 30 Ib. 228; *Schwass v. Hershey*, 125 Ib. 653; *Palmer v. Converse*, 60 Ib. 313.

Equity will not correct a mistake of law: *Gordere v. Downing*, 18 Ill. 492; *Fowler v. Black*, 136 Ib. 363.

W. J. Butler and Connolly & Mather, for the defendant in error.—Parol evidence is admissible in proceedings to reform a deed to show the intention of the parties: *McLennan v. Johnston*, 60 Ill. 306.

Was this a mistake of law? It certainly was not. A mistake of law is a misapprehension as to the effect of agreed conditions—*i. e.*, as to legal consequences: *Gordere v. Downing*, 18 Ill. 492.

A mistake of fact is a misapprehension not as to a result, but as to a condition. See *Pomeroy's Equity Jur.*, vol. 2, § 838, last half; *American and English Enc.*, vol. 20, p. 714.

That the evidence of the mistake is clear and convincing is a question of law—*i. e.*, a question neither susceptible of demonstration or illustration but one of individual opinion, based upon previous experience. Comparison may, however, be made: *Pomeroy, Eq. Jur.*, vol. 2, § 862, p. 331, note 1; *American and English Enc.*, vol. 15, p. 650, note 1.

That the evidence warrants a reformation of the deed, we refer the court to the case of *Day v. Day*, 84 N. C. 408.

The evidence shows that grantor's debilitated state of mind was one which equity will excuse from that close attention to business transactions which it would be unable to overlook in a more energetic mind. For equity requires only in accordance with one's power, and never demands more than would be practical to perform. Also, equity demands less circumspection in transactions between persons so related. (See *Day v. Day*, *supra*, p. 411.) The solicitor for the defendant seems to labor under the mistake that the complainant is seeking redress on account of insanity; if this were so, it would furnish ground for an avoidance of the deed, not a reformation of it.

MAGRUDER, J.—This is a bill filed on July 18, 1890, by the defendant in error, Frances A. Harrison; the mother of Peyton Asbury Purvines, deceased, by a former husband, against Frances Purvines, the minor daughter and only child of said Peyton Asbury Purvines, deceased; Samuel H. Claspill, the guardian of said minor; Alfred B. Purvines, the administrator of said deceased; and Edward Wyatt, a tenant occupying the premises hereinafter referred to under a lease from the complainant in the bill. The bill is filed for the purpose of reforming a deed of about sixty acres of land, executed by the defendant in error to her son, said Peyton A. Purvines, in his lifetime. The deed sought to be reformed bears date January 31, 1889, was acknowledged August 30, 1889, and recorded on September 2, 1889. It is a warranty deed, and conveys about sixty acres of land in Sangamon county to the grantee. The bill alleges that it was the intention of the complainant and her deceased son to insert words in the deed reserving to her a life estate in the land, so that she could have the use of it, and the rents from it, as long as she lived; but that, by the mutual mistake of the parties to the deed, and by an oversight on the part of the scrivener who drew it, such reservation was unintentionally omitted from the deed. The prayer of the bill is that the deed be reformed by inserting therein a reservation of the life estate to the grantor. A guardian *ad litem* was appointed for the minor, who answered; and answers denying the allegations of the bill were filed by said guardian and tenant, to which replications were filed. After proofs taken and hearings had, the Circuit Court rendered a decree finding the allegations of the bill to be true, and directing that the deed be reformed in the respect mentioned, and that such reformation take effect as of the date of the deed, and that the rents and profits of the land after that date should belong to the complainant.

Evidence was introduced showing that an inquisition as to the insanity of the complainant was had in the county

court of said county, and a verdict of the jury was returned therein on January 25, 1892, finding her to be an insane person; and thereafter her insanity was suggested in the present suit, and one B. F. Irwin was appointed to prosecute the same as next friend. Application had been previously made to the court, in March, 1890, for the appointment of a conservator for defendant in error as a distracted person, but upon the trial of the issue, whether she was a distracted person, a verdict had been rendered in her favor. Some evidence was introduced tending to show that when she made the deed her mind had begun to fail, and she showed signs of absent-mindedness not theretofore noticeable in her. Her son, Peyton A. Pervines, had been divorced from his wife before he died, and his habits up to the time of his death were those of a very intemperate man. There is no evidence, however, that he practiced any fraud upon his mother in order to obtain the deed. He lived with her at that time upon a farm of eighty acres, owned by her, and the consideration as expressed in the deed is "one dollar, and natural love and affection." He died unmarried and intestate on February 22, 1890, leaving, as his only child and heir-at-law, the minor plaintiff in error, Frances Purvines. After a careful examination of the evidence, we think that both parties executed the deed under a common or mutual mistake, and did what neither of them intended to do: *Warwick v. Smith*, 137 Ill. 504, N. E. 709. To justify the reformation of a written instrument upon the ground of mistake, it is necessary—First, that the mistake should be one of fact, and not of law (*Sibert v. McAvoy*, 15 Ill. 106); second, that the mistake should be proved by clear and convincing evidence (2 Pom. Eq. Jur., § 862); third, that the mistake should be mutual and common to both parties to the instrument (*Sutherland v. Sutherland*, 69 Ill. 481). A mistake of law is an erroneous conclusion as to the legal effect of known facts: *Hurd v. Hall*, 12 Wis. 113. The construction of words is a matter of law: *Sibert v. McAvoy*,

supra. Where parties instructed an officer to prepare a quit-claim deed for their execution, but he drew a deed containing language which amounted in law to a covenant of title in fee, and they signed the deed knowing that such language was in it, they were held to have been mistaken in the law—that is to say, in the legal effect of the language used—and in the legal consequences of retaining such language in the deed: *Gordere v. Downing*, 18 Ill. 492. Mistake of fact has been defined to be a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of a thing which has not existed: 2 Pom. Eq. Jur., § 839. It is manifest that the mistake in the present case was one of fact, and not one of law, because it had reference to the accidental omission from the deed of words which were intended to be inserted therein; that is to say, words reserving to the grantor a life interest. In *Sibert v. McAvoy*, *supra*, we said: “It is where parties intended to insert words in a contract which were by accident omitted that equity can reform the contract by inserting them. . . . The insertion of words is a matter of fact. It is for mistakes of fact alone that contracts may be reformed.” Nor can it be said in this case that the mistake occurred on account of any want of reasonable diligence to ascertain the facts, or on account of any neglect, amounting to a violation of legal duty: 2 Pom. Eq. Jur., § 856. Where the relation of the parties is one of confidence, such as that which existed here between mother and son, and where a party executing the contract has a failing or weak mind arising from suffering or old age, the same degree of vigilance and care is not expected or required as is expected or required in the ordinary dealings of men with one another: *Day v. Day*, 84 N. C. 408. In *Day v. Day*, *supra*, a deaf and aged father made a deed to his son, in whom he reposed

confidence, conveying a tract of land in fee ; but omitting, either by mistake or contrivance of the son, under whose direction the deed was drawn, to reserve a life estate to the grantor ; and it was held that an equity arose in favor of the father to have such instrument reformed in accordance with the original intention of the parties. Counsel for plaintiffs in error claim that the evidence does not show want of mental capacity in the defendant in error, or want of capacity on her part to understand the ordinary affairs of life. This may be true. The proof shows merely a weakening of the mental powers, growing out of domestic trouble, and grief for the recent death of her aged parents. This proof was not introduced for the purpose of showing such insanity as would avoid the deed ; but in a proceeding to reform the deed it tended, in connection with the relations of the parties and other attending circumstances, to excuse any apparent want of care in examining the phraseology of the deed. We think that the proof of a mutual mistake was clear and convincing. The burden of proof was upon the complainant, but the defendants offered no testimony whatever to contradict her witness. Some time after the deed was executed the deceased applied for a loan of money to be secured by mortgage upon his interest in the land. He then discovered for the first time that his mother's life estate had not been reserved in the deed. There is abundant evidence, given by quite a number of witnesses, that he admitted the mistake, and stated that it was the intention and agreement to retain a life estate for her in the deed, and that he intended to correct the mistake. He died, however, without doing so. These declarations, made many times, and challenged by no opposing evidence, were admissions against his own interest. It is well settled that parol proof may be received to show a mistake in a written instrument: *McLennan v. Johnston*, 60 Ill. 306. For the reasons here stated, and deeming it unnecessary to enter into a detailed discussion of the evidence, we think that the

decree of the Circuit Court was correct, and it is accordingly affirmed.

Affirmed.

PHILLIPS, J., having heard this case in the Circuit Court, took no part here.

Where it is clear that an instrument does not express the intent of the parties, owing to the innocent omission or insertion of a material stipulation, equity has jurisdiction to grant relief by way of reformation on the ground of mistake: *Story Eq. Juris.*, § 155; *Parker v. Parker*, 88 Ala. 362; *Clark v. Roots*, 50 Ark. 179; *Cleghorn v. Rumwalt*, 83 Cal. 155; *Adams v. Wheeler*, 122 Ind. 354; *Taylor v. Deverill*, 43 Kan. 469; *Andrews v. Andrews*, 81 Me. 337; *Cross v. Bean*, *Ib.* 525; *Probett v. Walters*, 70 Mich. 437; *Conlin v. Maucar*, 80 *Ib.* 139; *Rice v. Kelsit*, 42 Minn. 511; *Corrigan v. Tierney*, 100 Mo. 276; *Fowler v. Vreeland*, 44 N. J. Eq. 268; *Haack v. Weiken*, 118 N. Y. 67; *Jackson v. Andrews*, 59 *Ib.* 244; *Harding v. Long*, 103 N. C. 1; *Day v. Day*, 84 *Ib.* 108; *Hyland v. Hyland*, 19 Oreg. 51; *Hallenbach's Appeal*, 121 Pa. 322; *Moore v. Hazelwood*, 67 Tex. 624; *Grossbach v. Brown*, 72 Wisc. 458; *Canedy v. Marcy*, 13 Gray, 373; *Bush v. Merriman*, 87 Mich. 260; *Henkle v. Royal Assur. Co.*, 1 Ves. 314; *Gillespie v. Moon*, 2 John. Ch. 585; *Cannon v. Collins*, 3 Del. Ch. 132; *Lanyon v. Martin*, L. R. 13 Ir. 297; *Jaynes v. Statham*, 3 Atk. 389; *Ramsbottom v. Gosden*, 1 V. & B. 108; *Townsend v. Stangroom*, 6 Ves. 336; *Pitcairn v. Ogbourne*, 2 Ves. 377; thus where there is a mistake of a scrivener which prevents the instrument from expressing the intent of the parties, it will be reformed: *Linton v. Unexcelled Fire Works Co.*, 128 N. Y. 672; *Lough v. Michael*, 37 W. Va. 679; *Perry v. Knight*, 85 Me. 184; *May v. Adams*, 58 Vt. 74; *Wilcox v. Lucas*, 121 Mass. 21; *Allen v. McGaughy*, 31 Ark. 252; *Goode v. Patrick*, 151 Mass. 585; *Brown v. Lamphear*, 35 Vt. 22; *Lindsay v. Davenport*, 18 Ill. 380; *Watson v. Marston*, 4 De G., M. & G. 230. Reformation will be decreed when by mistake there has been omitted from the instrument a reservation of timber: *Fen v. H. M. Loud & Sons Lumber Co.* (Mich.), 59 N. W. 603; or of a certain kind of timber: *Osterhout & Fox Lumber*

Co. *v.* Rice, 93 Mich. 353; or of a rent in kind: *Sanner v. Smith*, 51 Ill. App. 671; so when conditions have been omitted: *Kessel v. Kessel*, 79 Wisc. 289, and see *Baumgardner v. Reeves*, 35 Pa. 250; or there is a mistake as to the length of time a mortgage shall run: *Lippincott v. Whitman*, 83 Pa. 244; or an omission of land which should have been included: *Uttersen Lumber Co. v. Rennick*, 21 Can. S. C. 218; *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293; *Elwood v. Stewart*, 5 Wash. 736; or the deed fails to recite the assumption of a mortgage: *Williams v. Everham* (Iowa), 57 N. W. 901; where a reversionary interest has been by mistake included in deed: *Canedy v. Marcy*, 13 Gray, 373.

Relief by reformation will not be given where the instrument agreed upon by the parties has been executed, but has an effect in law other than that which the parties supposed: *Hunt v. Rousmanier*, 1 Pet. 13; *Pitcher v. Hennessey*, 48 N. Y. 415; *Rector v. Collins*, 46 Ark. 167; *Hicks v. Coody*, 49 Ib. 424; *Birkhausen v. Schmidt*, 45 Wisc. 316; *Hoover v. Reilly*, 2 Abb. (N. S.) 471; *Burt v. Wilson*, 28 Cal. 632; *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717; *Beach Mod. Eq. Juris.*, § 540; *Cochran v. Pew*, 159 Pa. 184; but it may be otherwise when, to accomplish a given purpose, both parties, acting under the advice of a third person upon whom they would have a right to rely, execute a deed which does not accomplish the purpose: *Whitmore v. Hay*, 56 N. W. 708; *Kilduffe v. Maitland*, 30 W. N. C. 46.

In order to afford a ground for relief the mistake must be mutual. Where one party to a writing sets up in effect one different in terms, he must show not merely his own understanding as to the terms which it is sought to introduce by way of reformation, but that the other party had the same understanding: *Ludington v. Ford*, 33 Mich. 123; *Paine v. Jones*, 73 N. Y. 193; *Darnley v. Proprs. of L. C. & D. R. W. Co.*, L. R. 2 H. L. 43; *Liggett v. Shira*, 159 Pa. 350; *Northfield Farmers' Twp. Mut. F. Ins. Co. v. Sweet*, 46 Ill. App. 598; and before reformation will be decreed the mistake must be made to appear beyond reasonable controversy: *Woollam v. Hearn*, 7 Ves. 211; *Davis v. Symonds*, 1 Cox, 402; *Martin v. Pycroft*, 2 De G., M. & G. 785; *Dean v. Venly*, 17 W. R. 567; *Darnley v.*

Proprs. of L. C. & D. R. W. Co., *supra*; Edmands's Appeal, 59 Pa. 220; Mosby *v.* Wall, 23 Miss. 81; Tilton *v.* Tilton, 9 N. H. 385; Philpot *v.* Elliott, 4 Md. Ch. 273; Kern *v.* Middleton, 24 W. N. C. 383; Bodwell *v.* Heaton, 40 Kan. 36.

Reformation of mortgage—Reformation as against purchaser with notice.

WALLS ET AL. *v.* STATE EX REL. MALOTT.

(Supreme Court of Indiana, September 26, 1894.)

A mortgage may be reformed and foreclosed against a subsequent purchaser with notice of the mistake on account of which reformation is sought.

One who takes a conveyance and assumes the payment of any mortgage to the school fund of a state upon the land of which he is grantee, knowing at the time that his deed covers the only land owned by the mortgagor and that there is a school-fund mortgage in the mortgagor's name, the description of which differs from the description in the deed, cannot successfully defend against a proceeding to reform the mortgage by correcting the description so as to make it conform with the land owned by the original mortgagor, on the ground that he is a *bona fide* purchaser without notice.

A complaint in an action to reform and foreclose a mortgage need not allege a demand for reformation before bringing action.

Appeal from Circuit Court, Lawrence county; R. W. MEETS, Judge.

This was an action brought by John B. Malott against Hayden H. Walls and others for reformation of, and to foreclose, a mortgage. There was a judgment for the plaintiff and the defendants took this appeal.

James H. Willard, for appellant.

W. H. Martin, for appellee.

HOWARD, J.—This was an action brought by the appellee to reform and foreclose a school-fund mortgage. The land mortgaged had been sold twice subsequent to the date of

the mortgage, and at the time of the bringing of this action was owned by the appellant Willard.

The complaint is first assailed as defective for the reason that it shows no demand made upon appellant for reformation of the mortgage prior to the commencement of the action, and we are referred to *Axtel v. Chase*, 77 Ind. 74, in support of this contention. That case decides that a cause of action simply to correct an alleged mistake in a deed is not shown when no demand and refusal to make the correction are alleged in the complaint. The case is not in point here. The complaint before us shows a mortgage debt due and unpaid, and asks for judgment of foreclosure and sale of the land. The suit is not to correct a mistake simply. The request for reformation is incidental to the main action. As well said in *Axtel v. Chase*, 83 Ind. 546 : "The appellants were brought into court for the purpose of compelling them to pay their debt, and, being in court because of this failure, they are asked incidentally to correct the mortgage. No demand upon them to correct the mortgage was necessary."

It is next urged that the complaint is defective as to the description of the land mortgaged and the mistake sought to be corrected. Counsel correctly says that "a complaint to be good for the reformation of a mortgage should set out the land mortgaged and the mistake which occurred, and the prayer for relief should be for the reformation of the instrument in accordance with the correction of the mistake." We think, however, that the complaint in the case before us substantially complies with this requirement. The land mortgaged is described as "part of the southwest quarter of section thirty-one, town five north, range one east, beginning seventy-two poles west of the northeast corner of said quarter section," etc.; and it is said that by mutual mistake of the parties in writing the description of the lands in the mortgage the same was erroneously written so as to commence, "Seventy-two poles west of the north-

east corner of said section," instead of "quarter section," as was intended. Reformation of the mortgage is prayed. While the complaint may well be criticised as somewhat carelessly drawn, yet we think it states the facts essential to an action for reformation and foreclosure, and is not subject to demurrer for the reasons alleged.

The facts, as found by the court at the request of the appellant Willard, are substantially as follows: (1) That on the 30th day of October, 1884, William H. Mitchell, one of the defendants, was the owner in fee of the property in controversy, situated in Lawrence county and described as "a part of the southwest quarter of section thirty-one, town five north, range one east, beginning seventy-two poles west of the northeast corner of said quarter section, running south one-half mile; thence west forty-six and one-third poles; thence north one-half mile; thence east forty-six and one-third poles, to the place of beginning, containing forty-six and one-third acres," and that he owned no other real estate in said county, as shown by the records in the recorder's office. (2) That on said October 30, 1884, the said Mitchell negotiated with the auditor of the county for a loan of \$225 of the common-school fund, executing therefor his note to the state of Indiana in the sum of \$250, due in five years, and also agreed and undertook to execute a mortgage on said real estate to secure the payment of said loan, and that his wife joined with him and duly signed and executed said mortgage, which was on the 16th day of July following duly recorded in the records of mortgages in said county. (3) That the parties undertook and meant to mortgage the real estate described, so owned by said Mitchell, but by the mutual mistake of all the parties, described said real estate by the following mistaken description: "All the following tract or parcel of land situated in said county of Lawrence and state of Indiana, to wit: A part of the southwest quarter of section thirty-one, town five north, range one east, beginning seventy-two poles west

of the northeast corner of said section, running south half mile; thence west forty-six and one-third poles; thence north half mile; thence east forty-six and one-third poles, to the place of beginning, containing forty-six and one-third acres, more or less." (4) That on July 3, 1886, the said Mitchell, who lived in the state of Kansas, sold said land by warranty deed, correctly describing the land, to the defendants, Hayden H. Walls and wife, which deed was duly recorded in the recorder's office of Lawrence county, Indiana, August 12, 1886. All negotiations for such purchase were by written correspondence, and said deed was prepared by Walls, and sent by him to Mitchell, in Kansas, to be executed. In said deed was contained the following reservation: "There being, however, excepted from said warranty any mortgage to the school-fund of the state of Indiana standing against the above-described premises; any such mortgage upon the above-described premises to be paid by the above-named grantee, the payment being assumed by him." (5) That Walls negotiated said purchase for himself and the appellant Willard; each paying one-half the purchase price and both being joint owners of said land, although the deed was executed to Walls and his wife, as aforesaid. (6) That Hayden H. Walls, prior to said purchase, examined the records in the recorder's office of Lawrence county, and found there was no mortgage of record against the real estate, as properly described, but did find the mortgage above set out duly recorded. (7) That the appellant Willard had full knowledge of all the correspondence between Walls and Mitchell, and that Walls, prior to the acceptance of the deed, informed Willard that he had examined the records and that there was no mortgage on record against the property as described in Mitchell's deed, but informed him that the mortgage now in suit was on record, and told him that Mitchell thought there was a mortgage against the real estate so owned by him, but that he had examined the record and there was none

but the mortgage above set out. Walls was accustomed to and was competent to examine the records in the recorder's office. (8) That afterwards, on February 3, 1887, Willard bought the interest of Walls in said real estate, receiving a warranty deed therefor from Walls and wife, the land being correctly described. The deed contained the following reservation: "There being excepted, however, from said warranty any mortgage to the school fund of the state of Indiana standing against the said above-described premises. Any such mortgage upon the above-described premises to be paid by the above-named grantee, the payment being assumed by him." (9) That the appellant Willard never at any time examined the records of the recorder's office for liens against said real estate, and had no knowledge whatever of the existence of any lien or mortgage against said real estate other than the knowledge and notice above set out, until a short time before the commencement of this action, which was on the 28th day of March, 1887, and subsequent to his purchase from Walls. (10) That nothing has been paid upon said debt to the school fund.

Counsel for appellant contend that these findings are, in many respects, not sustained by the evidence. We have examined the evidence with much care and are satisfied that, though the evidence is in some cases lacking in definiteness, it is nevertheless quite sufficient to bear out the findings of the court. We think the evidence fairly tends to show that the mistake in describing the land in the mortgage was a mutual mistake of the parties. The auditor testified that Mitchell intended to mortgage the land described in the deed, but that by error the description was made to begin at the northeast corner of the section, instead of at the northeast corner of the quarter section. It was an error easy to be made by the auditor or his clerk in preparing the mortgage. Mitchell intended to mortgage the land by its proper description. The auditor, in preparing the mortgage, made an error in the description. We think it suffi-

ciently appears, as the court found, that the error was mutual.

It is said that the deeds from Mitchell to Walls and from Walls to Willard are not in evidence, and hence that it does not appear that Willard had knowledge of the mistake, or that the land was mortgaged, and that he is therefore a *bona fide* purchaser for value paid. The reservations in those deeds do not constitute the only source of knowledge to Willard of the mortgage, and of the mistake in the description of the land. He knew of the correspondence between Mitchell and Walls, in which reference is made to the mortgage, which of itself would have been sufficient to put him upon inquiry. Walls also testified that he examined the records in the auditor's and recorder's offices, and that he informed Willard, among other things, that there was a school-fund mortgage against land owned by Mitchell. It is not disputed that the land in controversy was all the land owned by Mitchell in Lawrence county. This information also should have put Willard on inquiry. The very error in the description should of itself have put any one upon inquiry. The mortgage, as recorded, appeared to be upon "a part of the southwest quarter of section thirty-one, . . . beginning seventy-two poles west of the northeast corner of said section." But a point west of the northeast corner of a section does not anywhere touch the southwest quarter of the section. The error, therefore, appears on the face of the description itself, and in addition, from the same description, it appears that the mortgage is upon a part of the southwest quarter of the section, the very quarter-section in which the land, as correctly described in the deeds, is situated. But, if the deeds were not technically introduced in evidence, they were at least read in evidence by the recorder from the record. The evidence so given by the recorder was not objected to at the time, and cannot be objected to here for the first time. The oral evidence, as given by the recorder, was at least good evidence, even if not the best,

and, being unobjected to on the trial, is good also on appeal. From the reservations as to warranty, as set out in the deed recited from the record in the evidence given by the county recorder, it is clear that the appellant Willard, in accepting his deed and agreeing to pay any school-fund mortgage upon the premises, was charged with such knowledge of the mortgage as not to be a *bona fide* purchaser without notice. The very deed by which he held title to the land put him upon inquiry. It is well settled that a mortgage may be reformed and foreclosed against a subsequent purchaser with notice of the mistake: *Pence v. Armstrong*, 95 Ind. 191.

Conclusions of law in favor of the appellee, in accordance with the finding of facts, and for reformation and foreclosure, were rendered by the court, and excepted to by the appellants. It is argued by counsel that the conclusions of law are not sufficiently full and explicit as to the kind and manner of reformation that should be had, and we are referred to the case of *Toops v. Snyder*, 47 Ind. 91, sustaining such contention. That case decides that the judgment should be as specific as the finding. There was there no question as to conclusions of law. It is not said that the conclusions of law in the case at bar are erroneous, but only that further and more detailed conclusions should be had. The conclusions are in favor of the appellee on the issues joined, and they are supported by the facts found. This is sufficient. In *Slauter v. Favorite*, 107 Ind. 291, it was held that if the ultimate judgment is right there can be no reversal, even though a conclusion of law might be erroneous. It is to the judgment and decree that we must look for the full and detailed carrying out of the finding and decision of the court. The decree in this case is full and explicit as to the rights of the parties under the issues and facts.

We have not been aided in this case by the brief of the appellee, the document so named containing neither argument nor citation of authority, and making no answer to

the able brief of the appellants. While the appellee is always entitled to an affirmance of the judgment in his favor unless some error in the trial or decision is pointed out by the appellant, yet it is equally the duty of the appellee to maintain the correctness of the proceedings and judgment of the trial court. If counsel for appellee fail of that duty, the labor must fall upon the court. By § 165, Rev. St. 1881, and § 165, Rev. St. 1894, this court is required, upon the decision of every case, to give a statement in writing of each question necessary to the final determination of the case. We will always, therefore, examine the record as fully as may be possible in each case, and will, whether such examination shows that the judgment should be affirmed or reversed, "give a statement in writing" containing such reasons and citations of authority as may sustain our decision. It is evident, however, that a party who depends on the mere assertion on his part that the judgment of the trial court was right, or that it was wrong ought not to complain if this court should not be able to see the law of the case in the light of such assertion. Our decisions must be based upon reason and authority, and it is a duty which counsel owe to their clients to aid the court by all the means in their power to arrive at a just conclusion. This aid is given by proper briefs; that is, short and pointed arguments and carefully selected authorities. Finding no available error in the record, the judgment is affirmed.

Equity will give relief in a proper case by way of reformation as against the original parties, those claiming under them in privity, such as personal representative heirs, devisees, legatees, mortgagees, voluntary grantees or judgment creditors, or purchasers from them with knowledge of the facts either constructive or actual: *Story Eq. Juris.*, § 165; *Warwick v. Warwick*, 3 *Atk.* 293; *Cross v. Bean*, 81 *Me.* 525; *Beach*, *Mod. Eq. Juris.*, § 542; *Berry v. Sowell*, 72 *Ala.* 14; *Carver v. Lassallete*, 57 *Wisc.* 232;

Hyland v. Hyland, 19 Oreg. 232; Smith v. Schweigerer, 129 Ind. 696; Ellwood v. Stewart, 5 Wash. 736; Paxson v. Brown, 61 Fed. Rep. 874; but not against *bona fide* purchasers for value without notice: Malden v. Merrill, 2 Atk. 13; West v. Errissey, 2 P. Will. 349; Powell v. Price, Ib. 535; Davidson v. Davidson, 42 Ark. 363; Pence v. Armstrong, 95 Ind. 191; Ruppert v. Haske, 5 Mack. 262. A deed or mortgage which simply fails to describe the land intended to be conveyed will not be reformed as against a *bona fide* purchaser for value, but a mortgage which contains a defective description may be reformed as against such a purchaser, because the defect is sufficient to put all persons upon inquiry: Pence v. Armstrong, *supra*; and a description even in a deed may be so vague as of itself to put the grantee on inquiry, as in Van Gunden v. Virginia Coal and Iron Co., 8 U. S. App. 229, where certain heirs made a deed reciting that their ancestor was seized and possessed of large bodies and tracts of land in specified counties and granting all of the said lands to which the said heirs had any title at law or in equity. In Cass County v. Oldham, 75 Mo. 50, it was held that the record of a deed which is void for insufficiency of description would not put a stranger upon inquiry.

This rule is in accord with the general rule of equity that it will not interfere, either for relief or discovery, against a *bona fide* purchaser of a legal estate for valuable consideration without notice of the adverse title or of any other circumstance affecting the apparent right to that which he purchases: Joyce v. De Moleyns, 2 Jones & Lat. 374; Atty. Gen. v. Wilkins, 17 Beav. 288; Gumm v. Parrott, 5 W. Rep. (C. P.) 882; s. c. 3 Jur. N. S. 1150; Phillips v. Phillips, 4 De G., F. & J. 208; Colyer v. Finch, 19 Beav. 500, *aff.* 5 H. & L. 905; Downer v. South Royalton Bank, 39 Vt. 25; Wailes v. Cooper, 24 Miss. 208; Brown v. Wood, 6 Rich. Eq. 155; Zollman v. Moore, 21 Grat. 313; Campbell's Appeal, 29 Pa. 401; Rexford v. Rexford, 7 Lans. 6; Dawson v. Ramson, 58 Ala. 573; King's Leasehold Est., L. R. 16 Eq. 521; The Horlock, 2 Prob. Div. 243. The case is strongly put in Hart v. Crealock, L. R. 10 Ch. 22, "from a purchaser for value without notice this court takes away nothing which the purchaser has honestly acquired."

A purchaser of an equitable title, who has the right to call for a conveyance of the legal estate, has the same equity as though he had the legal title and is entitled to the same protection: *Wilmot v. Pike*, 5 Hare, 14; *Pease v. Jackson*, L. R. 3 Ch. App. 576; *Robinson v. Trevor*, 12 Q. B. D. 423; and see *Walker v. Matthews*, 58 Ill. 196.

The purchaser, it is held, must have paid all the purchase-money before notice, if he would maintain his title: *Lewis v. Phillips*, 17 Ind. 108; *Rhodes v. Green*, 36 Ib. 7; *Patten v. Moore*, 32 N. H. 382; *Palmer v. Williams*, 24 Mich. 328; *Tidestley v. Lodge*, 3 Sm. & G. 543; but if, however, he have taken a conveyance upon part payment, it seems, he may avail himself of the legal estate as a security to the extent of the amount paid: *Beck v. Ulrich*, 13 Pa. 636; *Wood v. Mann*, 1 Sumn. 506; *Flagg v. Mann*, 2 Ib. 487.

What constitutes notice to a purchaser is a very important question in the determination of each case, for not only is the purchaser affected by direct notice, but also by constructive notice—*i. e.*, by notice which is attributed to him because of facts within the knowledge of his agent in the transaction in which he has acquired title; see *Vane v. Vane*, L. R. 8 Ch. App. 383; or which he himself would have acquired had he honestly and with due diligence pursued the line of inquiry suggested by facts already within his own knowledge, or which had been brought to his attention in the course of the transaction—for example, the knowledge that a deed is in existence affects the purchaser with notice of the contents of the deed. For cases in which there has been held to be such constructive notice as affected the purchaser, see *Hope v. Liddell*, 21 Beav. 183; *Penny v. Watts*, 1 McN. & G. 150; *Lewis v. Phillips*, 17 Ind. 108; *Logan v. Neill*, 128 Pa. 457; *Leaner v. Carley*, 43 Miss. 688; *Peto v. Hammond*, 30 Beav. 495; *Wailes v. Cooper*, 24 Miss. 208; *Sergeant v. Ingersoll*, 7 Pa. 340; *Kellogg v. Smith*, 26 N. Y. 18; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 407; *Paxson v. Brown*, 61 Fed. Rep. 874, and see *supra* *Pence v. Armstrong*; *Van Gunden v. Virginia Coal and Iron Co.* The doctrine of constructive notice by reason of the record of a deed depends upon statute. The rule is thus stated by Mr. Bispham: "Where an instrument, which is entitled to be recorded, is duly executed

and acknowledged and is recorded in the proper territorial limits, such a registration is notice of the contents of the instrument and of all legal and equitable rights and titles created thereby, to any person claiming from or under the same grant, by virtue of any title which existed in him at the time of the date of the duly recorded conveyance." Bisph. Eq., § 270.

A *bona fide* purchaser without notice from a purchaser, is not affected by his grantor's knowledge: *Tompkins v. Powell*, 6 Leigh, 596; *Bush v. Lathrop*, 22 N. Y. 548; *Bristol v. Elston*, 12 Johns. 452, and his own *bona fides* will protect one who, with notice, purchases from him: *Holmes v. Stout*, 3 C. E. Gr. 492; *Logan v. Eva*, 28 W. N. C. 474; *Varick v. Briggs*, 6 Paige, 323; *Jackson v. McChesney*, 7 Cow. 360.

A judgment creditor is not a purchaser within the rule of reformation: *Lorne v. Allen*, 68 Ga. 225, but where one has acquired a lien for a debt, contracted upon the faith of a record of a deed, a reformation will not be permitted so as to work prejudice to him: *Lough v. Michael*, 37 W. Va. 679.

Confidential relations—Cancellation of deed—Evidence—Dismissal of suit—Reinstatement.

SMITH ET AL. v. SNOWDEN ET AL.

(Court of Appeals of Kentucky, September 29, 1894.)

Where, in an action to set aside a conveyance by parents, who were seventy years old, and illiterate, to two of their children, who lived with them, taking charge of the farm, the deed recites a moneyed consideration, which is acknowledged in the deed as paid, when in fact there was none, the burden of the proof is on the grantees to show the absence of all fraud.

Where a father who is seventy years old, and illiterate, joined with other of his children in an action to set aside a deed to two of his sons on the ground of undue influence, and, after the case was dismissed as to him on his own motion, moved to set aside the dismissal on an affidavit that he had been persuaded to dismiss it by his sons, the dismissal should have been set aside.

Appeal from Circuit Court, Lee county.

Action by John W. Smith and others against Arch Snow-

den and another. There was a judgment for defendants, and plaintiffs appealed.

Riddell & Riddell and Hugh Rodman, for appellants.

H. L. Wheeler and J. B. White, for appellees.

HAZELRIGG, J.—In November, 1889, Lucy Snowden was the owner of certain tracts of land in Lee county, Ky., of the value of some six or seven thousand dollars. Her husband, James, had recently sold some \$3,000 worth of realty, a portion of the proceeds of which sale he still had, together with some stock and other personalty. These old people—the husband being some seventy odd years of age and the wife a few years younger—were living on the wife's land. They were ignorant, illiterate, enfeebled by old age and disease, and greatly dependent, in the management of their affairs, on their sons Arch and David P., who lived with and cared for them. Besides these two sons there was another, Asa, whose mental condition was below the ordinary. There was only one other child, a married daughter, Margaret Smith, who had been a cripple since her girlhood, and who lived with her husband and several children at some distance from her father and mother. A few days before the date named above, the sons Arch and David procured a surveyor, and had the lands of the mother run out, and deeds prepared conveying the whole of them to themselves, Arch getting about two-thirds, and David the balance. Their mother may have had some knowledge of this proceeding, but the father, who at least had a life estate in the land, had no notice whatever of what was being done. Mrs. Smith and her husband were kept in ignorance of it. The old people, however, unhesitatingly, and apparently voluntarily, signed and acknowledged the deeds, the recited consideration in one of them being \$500, another \$300, and a third \$500, all cash in hand paid, the receipt of which was acknowledged. The old lady, then afflicted with heart disease, died in a few months thereafter. This action was

then instituted by the old man, James Snowden, Asa, and the daughter, Margaret, and her husband, to set aside the deeds by reason of the imbecility and incompetency of the grantors, and the fraud, deception and controlling influence of the two grantees. After the case was prepared, an order was entered dismissing the action so far as James Snowden was concerned. This was on July 13, 1890. On the 16th of July, 1892, James Snowden offered to file his affidavit, and moved to set aside the order of dismissal. He tendered an amended petition, which appears to have been sworn to on July 13, 1892, in which he again sought to be made a party plaintiff, and claimed the relief he had originally claimed. His affidavit was to the effect that he had been persuaded by his son Arch to withdraw from the suit. The amendment was rejected, and, the case being submitted, the court dismissed the petition. The amended petition was made a part of the record, and James Snowden, together with the Smiths and Asa Snowden, have appealed to this court. In this connection we notice the verified plea of James Snowden, filed here October 28, 1893, directing the appeal to be dismissed so far as he is concerned, and this order has been made. Whether, if living, the old lady would have followed her husband in his rapidly changing and contradictory positions in this action, we have no means of knowing. We do know that after making the conveyances she denied having done so, and represented herself as in a position to still distribute her estate equally among all her children. She appeared willing enough to shift her position according to the company she was in.

In the consideration of this case the learned chancellor was doubtless guided by the general rule that the plaintiff who seeks to set aside a deed of the character here involved must take the burden, and make out affirmatively a case of fraud, or the existence of undue influence. As we have seen, so far as the proof of any witness goes, there is nothing to show otherwise than that the deeds were executed and

acknowledged freely and voluntarily. The conduct of the officer reading them and taking the acknowledgment is such as is usual, and is entirely free from suspicion. Nor does any witness testify to unsoundness of mind on the part of the grantors, or to the active operation of any hurtful or undue influence. But does this case fall within the class of cases in which the burden is on the plaintiffs? It is not the case of a gift from parent to child; no such consideration as love and affection is hinted at. On the contrary, the recited consideration is a pecuniary one solely, and the falsehood—for such we find it to be—is pushed to the extent of an assertion that the sum named is “cash paid in hand,” etc., when the proof discloses that not a dollar was paid or promised. Nor is this a case of the execution of a will, requiring the exercise of no contractual capacity. It seems to us that the relation of the parties is such—and the false recitations of the deeds emphasize this opinion—as to throw on the parties seeking to uphold the transaction the burden of showing the absence of all inequitable features, as well as that the parties acted voluntarily, deliberately and with full knowledge of the motive and effects of their acts. Mr. Pomeroy and Mr. Story so state the rule. The former says of such transactions: “When the accompanying incidents are inequitable, and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefits, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.” In the case under consideration the grantors were old, ignorant and enfeebled by disease; the grantees were vigorous, aggressive, and already in charge of the persons and the property of the grantors. We may say, in general, that when such a relation exists the person obtaining the benefit must show by the clearest evidence, that the transaction was freely and

voluntarily entered into and devoid of inequitable incidents. A most important feature in this case is the false recital of the consideration. These old people were themselves as clay in the hands of the potter. As to them the question of consideration was immaterial, but it appeared important to the grantees to show to those equally and naturally interested in the partition about to be made of the estate that a *bona fide* sale had been consummated for a valuable consideration. The recital of the false consideration carries with it the thought and purpose of a designing and intentional concealment of the truth. And this falsehood and concealment are the highest evidences of the fraudulent intent with which the writings were procured, not necessarily of actual, but of constructive fraud, assumed in view of the relation of the superior contracting with the inferior, the independent with the dependent, the strong with the weak. The grantees, it seems to us, can find no relief in assuming the position, after the attack on the deeds was made, that the real consideration was love and affection, and an agreement to care for the grantors during the remainder of their lives. The intent in the procurement of the writings must be gathered from the recitals of the writings themselves, and the beneficiary will not be relieved of the necessary inference of intentional deceit on his part by asserting a consideration inconsistent with the one named in the writing. We may say generally that when the parties to a deed sustain fiduciary and confidential relations towards each other, or when one of the parties is subject to the influence of the other, the writing should contain a fair and truthful statement of the transaction. See notes to § 928, Pom. Eq. Jur. The learned author last referred to says in such connection: "If the statement of the consideration is untrue, the instrument cannot be upheld. The party seeking to uphold it cannot prove, in order to sustain it, that the actual consideration was partly that represented in the deed and partly something else, since this would be inconsistent

with the consideration noted in the face of the instrument." And authorities are cited to the effect that, "if a pecuniary consideration is stated in the deed, and is impeached, the party cannot show and rely on the consideration of blood or love and affection: *Clarkson v. Hanway*, 2 P. Wms. 203; *Willan v. Willan*, 2 Dow. 274," though "if the recitals state a pecuniary consideration, and the operative part mentions love and affection as being in part the consideration of the deed, this discrepancy is not sufficient to raise a presumption of fraud: *Filmer v. Gott*, 4 Brown, Parl. Cas. 230." Without fully affirming the doctrine quoted to the extent announced by these authorities, we may safely say that the existence of misrepresentation, concealment and falsehood in material and important particulars in writings between parties occupying these delicate relationships towards each other affords the strongest evidence of fraudulent intent on the part of the superior contractor, and readily opens the way for equitable interposition. The vacillating conduct of the former complainant James Snowden does not merit as it would under ordinary circumstances, a refusal to hear his pleas, but is of itself evidence of want of mind and capacity. In order that the deeds may be set aside so far as they may affect the present appellants, Asa Snowden and the Smiths, the judgment below is reversed for proceedings consistent herewith.

One who acts as the agent of another, and possesses his confidence in such capacity, although not technically his attorney, must be prepared, in case any transaction between him and his principal be called in question, to show that there is an entire absence of fraud in the dealing. One who assumes the position of an agent gratuitously, or as a volunteer, is held to the same rule as to good faith, as though the relation were the result of a direct employment: *Dennis v. McCagg*, 32 Ill. 429; *Sattertwaite v. Loomis*, 81 Tex. 64; and the rule that the burden of showing good faith rests upon the agent, applies where the agent is the child of the principal: *Le Gendre v.*

Byrnes, 44 N. J. Eq. 372. For examples of cases in which deeds or contracts have been set aside when obtained by fraud or undue influence, brought to bear by a relative or friend standing in a confidential relation, as the adviser or volunteer agent of the grantor or contractor, see *Smith v. Cuddy*, 96 Mich. 562; *Armstrong v. Logan*, 115 Mo. 465; *Smith v. Smith*, 90 Mich. 97; *Darlington's Estate*, 30 W. N. C. 15; *Kyle v. Perdue*, 95 Ala. 579; *Corrigan v. Pironi*, 48 N. J. Eq. 607; *Mott v. Mott*, 49 N. J. Eq. 192; *Lamb v. Lamb* (N. J.), 23 Atl. 1609; *Fitch v. Reiser*, 79 Iowa, 24; *Martling v. Martling*, 47 N. J. Eq. 122.

The mere fact of kinship will not raise a presumption of fraud or undue influence in the case of a conveyance by father to son: *Collins v. Collins*, 45 N. J. Eq. 863.

In a case in which it was shown that there was no undue influence, and it was sought to set aside a deed executed by a mother seventy years of age, conveying all her property to her son, who was her sole agent and confidential adviser, the court held that it could not be set aside, either because the conveyance was such as no honorable man would accept, or as creating a presumption of mental incapacity and undue influence by its terms, or because the grantor had not independent advice: *Soberanes v. Soberanes* (Cal.), 31 Pac. 910.

Rescission of deed—Fraudulent promises of support.

REXFORD ET UX. v. SCHOFIELD.

(Supreme Court of Michigan, July 10, 1894.)

Plaintiffs conveyed a farm to defendant, their grandson, in consideration of his agreement to provide for them every comfort and necessary as long as they lived. Plaintiffs were old and feeble, and were induced to convey by defendant's declarations of his anxiety to relieve them from the care of the farm, and his statements that he was well off, and would give them a nice home in Chicago. He was not well off, and did not give them a home in Chicago, but sent his parents and sister to live with them on the farm. The latter regarded the change as made for their comfort, and not that of plaintiffs, whom they abused, and whose work and care they added to. *Held*, that the conveyance was rightly set aside.

Appeal from Circuit Court, Jackson county, in chancery ;
ERASTUS PECK, Judge.

Bill by William H. Rexford and wife to set aside a conveyance to defendant. Judgment for plaintiffs. The defendant appealed.

Barkworth & Blair, for appellant.

Wilson & Cobb, for appellees.

MCGRATH, C. J.—This bill is filed to set aside a conveyance made in April, 1891, by complainants to their grandson, the defendant, in consideration of his agreement “to provide every comfort and convenience essential to the decencies and necessities of life of both William H. Rexford and Harriet N. Rexford so long as they both may live ; . . . to insure his life for the benefit of said second parties, for the sum of \$1,000, in one of the best insurance companies in America ; . . . and to assume a certain obligation of William H. Rexford in favor of Mrs. A. R. Tibbits [a daughter] for the sum of \$100, together with any accrued interest thereon.” It is clear that complainants were old and feeble, that they relied implicitly upon defendant, and that they were induced to convey by defendant’s repeated declarations of his anxiety to relieve them from the burden of the care of the farm, and provide for their comfort, and his representations as to his financial ability. He resided in Chicago, and was engaged in a general brokerage business there ; living with his father, mother and sister. His mother had turned over to him a few hundred dollars—all that the family possessed—which he had invested in office furniture, and had undertaken the support of the family. In a letter written by defendant to his grandmother, December 7, 1890, he had represented that himself and partner had nearly made \$1,000 in cash, during the ten days preceding the 1st of December in commissions ; that he was then in Indianapolis “to arrange a last preliminary previous to a culminating point in our electric light company. This

one enterprise has over \$50,000 in store for me." This follows this inquiry: "Grandma, could you rest contented in a place of the size of Chicago, if you had a handsome little home in a pretty suburban park, with every possible convenience? Why I ask is this: that I have been offered a splendid place in Auburn Park by Dr. Lathrop, on easy terms, for \$6,500. The house alone cost \$4,000 for building. The finish is in hardwood throughout—rich mantels, gas, bath, furnace, etc.—and I have almost decided to buy same. If I thought you and grandpa would come and make your home with us, it would be an additional incentive for me to do so. Besides, it is not going to be long before I will have more money than I will know how to use, it is feared." On December 11, 1890, the daughter, then with the old people, wrote to defendant, suggesting that complainants were getting old and feeble, and unable to operate the farm; that she was about to leave them; that she thought they could be induced to leave the farm—and suggested that he make a proposition to them, involving their care and comfort in the future. On December 14, 1890, the grandmother wrote to defendant as follows: "I have felt for some time like I did not know what would be best for us to do, as Alta cannot stay longer with us, and besides there is a good deal of hard work on the farm; and she, of course, would earn a good deal more for herself than we could give her to stay, and we have to make some kind of arrangements soon, now, so she may know what to depend upon. I would not wish to be kept at your expense; but want arrangements made so you would be sure of receiving a reasonable remuneration for caring for us, and would want the property we have to last as long as we both live, and give us a decent burial. I feel like I could accept of your kind offer, and I don't doubt but father, too, for he can't do much, and it is a great effort for him to do anything; and, since I can't work, I feel weaned from the farm, and am willing to leave it. We want to know your

terms, and please write. I wish you could be here, and talk with us, and then we could come to some kind of an understanding as to what we should do." Other correspondence followed, but no proposition was made or discussed. In April, 1891, defendant visited the old people, and brought with him, and exhibited to them, certificates of stock in various enterprises, and a policy of insurance upon the life of his partner, informing the old people that these papers represented vast wealth. The execution of the deed and contract resulted. Nothing appears to have been said about their removing to Chicago. Complainants were desirous of making provision for the payment of \$200 to each of the five children of complainants, and defendant suggested the insurance policy upon his own life. He returned to Chicago, and sent them a policy for \$1,000, payable, in case his grandparents should survive him, to them; otherwise, to his mother. The receipt of this policy aroused the suspicion of the old people, and they wrote him, complaining. Then follow several letters from him, deploring the seeming loss of confidence in him, reiterating his assurances of good faith, and his affection, and his extravagant assertions respecting his earnings and financial ability, and promising further provisions for their ease and pleasure. In the meantime he had sent his father, mother and sister to the farm. Evidently, this course had been suggested by defendant, he assuring the old people that his father, who had been intemperate in his habits, and a good-for-nothing generally, had reformed, and would manage the farm, and relieve the old people from all care. The father, mother and daughter came. The mother and daughter seemed to regard the change as having been made for their comfort and ease, rather than for the benefit of the old people. The defendant's father soon demonstrated that his reformation was not permanent, and not only proved to be a nuisance about the farm, but abused the complainants. Thus, the old people, instead of being relieved from work and care,

were further burdened with these surroundings, and were at the same time given to understand that the rights of the new-comers were paramount. Complaints were made to defendant, who came on from Chicago, when it was suggested to him that the papers be canceled; but he left, after having informed complainants that he had given his people a talking to, and asked complainants to bear with them a little longer. The same trouble continued, and complainants afterwards filed this bill.

It clearly appears from this record that the only available assets that the defendant was possessed of, at the time the deed and contract were made, were the furniture with which the flat in which defendant and his parents lived was supplied, and his interest in his own office furniture. It is also clear from this record that at that time defendant's family were dependent upon him, and that the farm was selected as a place for them, and with a view of his relief from their support, rather than with reference to any benefit that complainants should receive from their presence. It is urged that the father, mother and daughter could not get along with complainants, because of their idiosyncrasies; but these were well known, and children who contract for the care, ease, comfort and convenience of aged parents, with the full knowledge of their infirmities, cannot be heard to plead those infirmities as an excuse for a failure to carry out the contract, especially upon a record which so abounds with evidences of bad faith and overreaching as does this record.

The decree is affirmed, with costs to complainants.

The other justices concurred.

The mere fact that the grantor was feeble, or even feeble-minded, will not by itself be sufficient to prove that he was imposed upon, if he had sufficient legal capacity to make a deed or contract: *Albrecht v. Albrecht* (Minn.), 45 N. W. 145; *Reeve v. Bonwill*, 5 Del. Ch. 1; *Jones v. Thompson*, *Ib.* 374; *Davis v. Phillips*, 88 Mich. 198; *King v. Humphreys*, 138 Pa.

310; *Likens v. Likens* (Md.), 27 S. W. 531; *Cutler v. Zollinger* (Mo.), 22 S. W. 895; *Duncan v. Mason* (Ky.), 20 S. W. 252; *Waterman v. Higgins* (Fla.), 10 So. 97; *Trimbo v. Trimbo*, 47 Minn. 389; but it will be taken into consideration with the relation of the parties, and will have its weight in determining the question of the existence of fraud: *Fitch v. Reiser*, 79 Iowa, 24; *Hicks v. Thomas* (Cal.), 27 Pac. 208, 376; *Galbraith v. McLaughlin* (Iowa), 59 N. W. 338; *Hall v. Hall* (S. Car.), 19 S. E. 305; *Hasley v. Asher* (Ky.), 22 S. W. 434; *Ashmead v. Reynolds* (Ind.), 33 N. E. 763. The same rule will apply in the case of a person of great age, when the faculties have been impaired thereby: *Klose v. Hellenbraid*, 88 Cal. 373; *Stewart v. Curtis*, 85 Mich. 496; *Colyer v. Hyden* (Ky.), 21 S. W. 868; *Paine v. Aldrich*, 133 N. Y. 544; *Kennedy v. Currie*, 3 Wash. 442.

Cancellation of deed.

CHAPMAN *v.* LONG ET UX.

(Supreme Court of Vermont, Washington, August 25, 1894.)

A father executed to his children, one of whom was a married woman, a deed of all his property, and received a deed conditioned for his support and for reconveyance on payment of expenses incurred. The latter deed was void, having been signed by the married daughter without being joined by her husband. No support was furnished, and defendants refused to reconvey. *Held*, that equity would not compel defendants to execute a proper deed, but would consider the former deed voidable at the instance of the grantor, if the rights of third parties were not affected.

Appeal in chancery, Washington county; TART, Judge.

Bill in chancery by George S. Chapman against Addie Long and Fred Long, her husband, to perfect title. There was a decree for plaintiff. The defendants appealed.

John H. Senter, for orator.

Frank J. Martin and *Frederick P. Carleton*, for defendants.

MUNSON, J.—In pursuance of an arrangement agreed upon by the orator and his two children, Perley A. Chap-

man and the defendant, Addie, the orator executed to said children a deed of his real and personal estate, and received from them a deed conditioned for his support through life, and for a reconveyance of the property, upon the payment of expenses incurred, in case the orator should at any time desire to provide for himself. The defendant Addie, who was and is a married woman, executed this conveyance to the orator without being joined therein by her husband. The orator has taken nothing from the defendants in the way of support, and has been refused a reconveyance on demand. The relief specifically prayed for is that the husband be decreed to join the wife in such proceedings as may be necessary to perfect the orator's title, and that both defendants be decreed to execute and deliver to the orator a deed of the property, and that, in default of a conveyance of the property, they be foreclosed of all equity of redemption therein. It might be difficult to give the orator the precise relief prayed for. The deed of the defendant Addie is void for want of a proper execution. It has been repeatedly held that the deed of a married woman thus defective cannot be perfected in equity: *Tiernan v. Poor*, 19 Am. Dec. 230, note. This is what is attempted by praying for a new conveyance properly executed. The right of a court of equity to compel another conveyance has been distinctly denied. In *Townsley v. Chapin*, 12 Allen, 476, a married woman had given a quit-claim deed without the required action of her husband. The husband having died a bill in equity was brought to compel the execution of a new deed. It was not claimed that the court could have required the husband to take any action to perfect the void conveyance. The court considered it equally beyond its power to require a new conveyance from the wife after the husband's death. Nor, if this position is correct, can the alternative prayer for a foreclosure in default of a new conveyance be of avail. If the mortgage must remain void the orator can obtain no

title by a foreclosure of it. But we think equity can give the orator relief in another form. The orator and the defendant Addie entered into a certain agreement, which both understood was to be expressed in two instruments. Neither instrument alone was designed to express the whole agreement. The invalidity of one of the instruments prevented the agreement from being perfected as the parties intended it should be. They attempted to carry their understanding into effect, but failed to do so. Certainly that fragment of the agreement embodied in the instrument duly executed should not be suffered to stand as the agreement of the parties. We think that when persons undertake to perfect an arrangement by two instruments and one of these instruments is from ignorance so defectively executed as to be void, and the party in default refuses to remedy the defect, the other instrument should be treated by equity as voidable at the instance of the grantor, when the rights of third persons have not intervened. It is apparent from *McKenzie v. McKenzie*, 52 Vt. 271, that this relief need not be denied because of the character of the mistake. In that case two mortgages had been given upon the same property. The orator had become the owner of all the notes secured by the first mortgage, but without any formal assignment of the security. It was arranged between the mortgagors and the orator that such writings should be made as would express the orator's relation to the first mortgage. The person applied to for this purpose had the orator take another mortgage and new notes in his own name, and discharge the first mortgage on the margin of the record. The orator having brought his bill for relief on the ground of mistake, it was claimed in behalf of the holders of the second mortgage that the mistake was one of law and not of fact, and that no relief could be given; but the orator's claim was established as a first lien upon the property, notwithstanding the discharge. We think the deed of the orator should be

treated as of no effect, and that such decree should be entered as will make his title good upon the record. Decree reversed and cause remanded with mandate.

ROWELL, J., was absent in County Court.

A deed of a married woman defectively executed cannot be perfected in equity: *Hamar v. Medsker*, 60 Ind. 413; *Shroyer v. Nickell*, 55 Mo. 264; *Leonis v. Lazzarovich*, 55 Cal. 52; *Cammock v. Carpenter*, 22 Wash. L. Rep. 302.

Relief may be given where an instrument, although legal in shape, fails to carry out the real intent of the parties to a contract or transaction of which it forms a part, so long, that is, as the rights of third parties have not intervened, and this whether the mistake is a mere scrivener's blunder: *Elliott v. Sackett*, 108 U. S. 132; *Monroe v. Skelton*, 36 Ind. 302; *Bush v. Merri- man*, 87 Mich. 260; or the papers fail for other causes to carry out the real intent of the whole transaction, thus in *Anderson v. Pignet*, L. R. 8 Ch. App. 181, A, a lessee for a term, mortgaged the same to trustees. He acquired the fee and afterwards became bankrupt. By agreement a deed was made releasing the mortgage debt and conveying the fee to the mortgagees. A's wife was to have joined in the deed, but did not, and after his death attempted to enforce a claim for dower. It was held that the debt should be regarded as still in force, and the term as not satisfied, for the intention of the parties was not to convey subject to dower. And see, on the subject of relief in cases of mistake of the character involved in the principal case, which perhaps may be called failure to carry out intent induced by mistake as to the effect of an instrument: *Albany City Savings Institution v. Burdick*, 87 N. Y. 40; *Watson v. Marston*, 4 De G., M. & G. 230; *Wood v. Scarth*, 2 K. & J. 38; *Re Saxon Life Insurance Co.*, 2 John. & Hem. 408; *Matlock v. Glover*, 63 Tex. 231; *Hiscock v. Foley* 14 Pa. 540 (a case resembling in some particulars the principal case); *Canedy v. Marcy*, 13 Gray, 373; *Green v. M. & E. R. R. Co.*, 12 N. J. Eq. 165; *Hausman v. Burnham*, 59 Conn. 117; *Slidewell v. Anderson*, 21 Ib. 144; *Evarts v. Strode*, 11 Oh. 480; *Sparks v. Pittman*, 51 Miss. 511; *Eastman v. Provident Mut. Rel. Assn.*, 65 N. H. 176; *Griswold v.*

Hazard, 141 U. S. 260; *Barker v. Smith*, 92 Mich. 336; *Morgan v. Bell*, 3 Wash. 534; *Kilduffe v. Maitland*, 30 W. N. C. 46; *Hall v. Otterson* (N. J.), 28 Atl. 907.

In some cases the courts, in order to avoid seeming to trespass upon the rule of equity that relief will not be given in case of mistake of law, have declared that when a paper is executed in reliance on the statement of the draftsman, which is erroneous in law, the mistake of the person executing it is not a mistake of law but of fact. See *Bush v. Merriman*, *supra*; *Gross v. Lehr*, 47 Pa. 520.

It would seem that in all cases of this character, which may be said to be on the border line, there must be an element which would render it unfair and inequitable that the contract should be permitted to stand as it appears on its face, before equity will interpose to relieve an aggrieved party; for example, as in the present case, where a refusal of interposition would leave one party in possession of land or anything else, without there being any method of compelling him to pay the agreed consideration, or where one party has, or assumes to have a superior knowledge of the law, and the other acts upon what the first party states as the law, and the first party thereby obtains an undue advantage: *Moreland v. Atchison*, 19 Tex. 303; *Miller's Appeal*, 84 Pa. 391; *Martin v. N. Y. S. & W. R. R. Co.*, 36 N. J. Eq. 199; *Wallace v. Wallace*, 2 Dr. & W. 452; *Whelen's Appeal*, 70 Pa. 410.

Fraud—Deed made to defraud creditors—Rescission at suit of grantor.

PRIDE ET AL. v. ANDREW ET UX.

(Supreme Court of Ohio, May 22, 1894.)

Where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another, with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he cannot, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey to him the property.

Error to Circuit Court, Washington county.

Suit by James B. F. Pride and others against George Andrew and Margaret Andrew, his wife, to set aside a certain conveyance.

The third amended petition alleged as follows :

"Said plaintiffs say that they, James B. F. Pride, Jesse Pride, Mary Pride and Bertha Pride, the last three named being the sole and only heirs of William Pride, deceased, Baruch Pride, Alvira Headly, formerly Alvira Pride, wife of Thomas Headly, and the said defendant Margaret Andrew, wife of said G. Andrew, were heirs-at-law of one Jesse Pride, late of said county and state, deceased, who died testate, and whose will was duly admitted to probate in said county, and probated by the Probate Court of said county, and is as such now, by due and proper proof and the record thereof, the valid will of said Jesse Pride, deceased. That, among other things, the said last will of said Jesse Pride devised as follows, to wit: First, 'I give and devise to my beloved wife (in lieu of her dowry) the farm on which we now reside, situate in Belpre township, Washington county, Ohio, containing twenty-five acres, more or less, with all the stock, household goods, furniture, provisions, and other goods and chattels which may be thereon at the time of my decease, during her natural life. At the death of my said wife, the real estate aforesaid I give and bequeath or devise to my sons, William Pride and Baruch Pride and James B. Finley Pride, and Margaret Andrew and Alvira Headly, my daughters, and their heirs. If, however, either of my aforesaid sons or daughters should die before the decease of my said wife, leaving no children living at the decease of my said wife, then the shares of said property above devised to such deceased son or daughter shall be equally divided among or between the remaining sons and daughters aforesaid by me. If my said wife should not survive me, then I devise and bequeath the property aforesaid to my sons and daughters aforesaid.' Plaintiffs say that on or about the — day of — 188—, the wife of said Jesse

Pride departed this life. That the said William Pride, named in said will, has also departed this life, and left as his sole and only heirs-at-law said Jesse Pride, Mary Pride and Bertha Pride, named above. That the plaintiffs and defendants, except George Andrew, are the persons named in said will to whom the estate of said real estate, mentioned in said will as twenty-five acres, more or less, in Belpre township, in remainder, was devised; and plaintiffs say that after execution of said will, to wit: about June 2, 1881, said Jesse Pride was seized in fee and in the possession of the following real estate, situate in said county of Washington and state of Ohio, and being the same real estate described in said will as devised to the parties named as devisees, and described as follows, to wit: [Here follows a description of said real estate, containing 28.99 acres, more or less.] Plaintiffs say that at said date last aforesaid there was pending in the Circuit Court of Pleasants county, W. Va., a certain action wherein Maunderville Coe and Margaret Coe, his wife, were plaintiffs, and one Sarah A. Rawson, Elizabeth Rawson and said Jesse Pride, deceased, were defendants. That said action was upon a guardian's bond, executed by said Elizabeth Rawson as principal, and said Jesse Pride was her surety therein, in which said bond said Elizabeth Rawson was named as the guardian of Jesse Rawson, Elizabeth Rawson, Nancy Rawson and Isaac Rawson, heirs and children of said Elizabeth and her said husband, Eliot Rawson; said action being on said bond by said Maunderville Coe and Margaret Coe against said Elizabeth Rawson and Jesse Pride, to recover of said defendants the share of said Margaret Coe in the estate of her deceased father, Eliot Rawson, amounting to \$1,200 or \$1,500. Plaintiffs say that said claim set up in said action was wholly illegal and unfounded and that there was no legal or equitable liability as against said Jesse Pride arising out of his suretyship on said bond or otherwise in said action, as the said Margaret, at the time of said execution of said bond by said Jesse Pride, was not

born. And plaintiffs further say that said Jesse Pride, in order to prevent the collection and payment of said pretended demand and claim, or any part thereof, and for no other purpose whatever, and with no intent or purpose whatever of defrauding any of his lawful creditors who had just and legal claims against him, said Jesse Pride entered into an agreement with the said defendant George Andrew, by which it was agreed by and between said Andrew and said Jesse Pride that said Jesse Pride should convey by good and sufficient deed in law, the land and premises above described; and when and if said Jesse Pride should be relieved and discharged from said unfounded claim made in said suit, the said George Andrew agreed and was to reconvey said land and premises to said Jesse Pride by a good and sufficient deed in law. That under and by virtue of said agreement said Jesse Pride did then and there convey to said George Andrew, by a good and sufficient deed in law, on its face at a nominal consideration of \$2,000, but in fact without any consideration therefor whatever. That after said conveyance said Jesse Pride remained in the possession of said premises, paid the taxes on the same, made improvements on said farm, cultivated the same, and thereupon exercised entire control over the same, paid no rents to said Andrew for the use of said land, nor did said Andrew claim any ownership over said land, nor ask, claim or demand any rent for the same of said Jesse Pride. Said plaintiffs say that at the time of said conveyance and prior thereto, said Jesse Pride being very aged, to wit: about eighty-two years old, and being feeble in health, and by reason of the said litigation in West Virginia, as aforesaid, he became and was very weak in mind; and the effect of his feebleness from age in both body and mind, connected with the trouble arising from said litigation, was such that at the date of said conveyance he had not capacity or mind sufficient in law to comprehend and enter into and make such a disposition of his said property as to dispose of the

same by deed as aforesaid or in any other manner; and by reason of the state of mind of said Jesse Pride and the promises of said defendants George Andrew and Margaret Andrew, wife of said George, that they would take and hold said real estate for him, and reconvey the same to him when he should be relieved from said litigation and trouble by reason thereof, and at the urgent solicitations of, and the undue and improper influence of, said George and Margaret Andrew over him at said time, said conveyance was made. Said plaintiffs say that said defendants had full knowledge of all the facts above stated in regard to said litigation, and also of the weak condition of the mind of said Jesse, and the sole purpose for which said conveyance was made as above stated, and also the effect of their influence as aforesaid over him. Said plaintiffs say that said Jesse Pride by the consideration of said Circuit Court of Pleasant county, W. Va., was adjudged never to have been subject to any liability in said case, nor upon the cause of action therein set forth, and was wholly discharged and relieved therefrom and from all liability whatever by reason thereof; and that, after said discharge of said Jesse Pride from said litigation, and the determination of said litigation in his favor, he called upon said defendants, and requested them to reconvey said premises to him according to said agreement, but said defendants then and there wholly refused so to do, and still refuse; and immediately upon the death of said Jesse Pride said plaintiffs requested said defendants to convey said premises to them in such proportions as they, by virtue of the devises in said will, were entitled, but said defendants then and still wholly neglect and refuse so to do, or allow said property to be disposed of as provided in said will. Plaintiffs say they had no knowledge of said conveyance. nor did they counsel or advise or take any part in said transaction whatever. Wherefore they pray that said conveyance may be set aside, and that said real estate described above may be divided and disposed of as provided

in the said last will and testament as herein set out, and for all other relief as, in equity, plaintiffs are entitled to have received."

To this petition there was a demurrer, which was overruled. An answer was then filed to said petition as follows:

"And now come the said defendants, and for their answer to the third amended petition of plaintiffs say: They admit that said Jesse, Mary and Bertha Pride, plaintiffs, are the sole and only heirs of William Pride, deceased; that said Jesse Pride, late of said Washington county, in said petition mentioned, died testate, and that his will was admitted for probate as in said petition alleged, and that by said last will he made the devises as in said petition set forth; and said defendants admit about June 2, 1881, said Jesse Pride, deceased, was seized in fee of the said premises in said petition described, being the same premises as devised by his said last will; and that at said date a certain action was pending against said Jesse Pride, in the Circuit Court of Pleasants county, W. Va., but said defendants deny each and every other allegation, except those specifically admitted as aforesaid, in said petition contained."

The cause was heard upon the third amended petition, the answer of the defendants thereto, and the evidence, and judgment was rendered for the defendants. The plaintiffs appealed to the Circuit Court. The cause was heard in the Circuit Court upon the third amended petition, the answer of the defendants thereto, and the evidence, and the court found, upon the issues joined, for the defendants.

At the request of parties, the court made the following special finding of facts, viz.: "That the said Jesse Pride, deceased, at the time when he executed and delivered the deed of conveyance to the defendant George Andrew, mentioned in said petition, to wit: on the 2d day of June, A. D. 1881, was of sound mind and of sufficient mental capacity to make said conveyance; that said conveyance was not

intended by him as a gift, but was made without consideration moving to the said Jesse Pride, and without any agreement of the said defendants, or either of them, to reconvey the property mentioned in said deed to the said Jesse Pride or any other person; that said conveyance was made by Jesse Pride with the intent, and for the purpose on his part, to hinder and delay and defeat the seizure or application of said property to the satisfaction of the claim of Maunderville Coe and Margaret Coe, then pending against him, the said Jesse Pride, in the Circuit Court of Pleasants county, W. Va., mentioned in said petition, in case judgment should afterwards be recovered against him thereon; that judgment was afterwards rendered in favor of said Pride and against the validity and justness of the claim of said Maunderville and Margaret Coe in said proceeding in said Pleasants county, and before any demand was made for a reconveyance of said property, and that said conveyance was made without any fraud or undue influence on the part of said defendants, or either of them." It was adjudged and decreed by the Circuit Court that plaintiffs' petition be dismissed, and that the defendants go hence without day, and recover of the plaintiffs their costs in and about the action expended, and that the cause be remanded to the Court of Common Pleas to carry said judgment into execution. To reverse the judgment of the Circuit Court this proceeding in error was prosecuted.

Loomis & Knowles, for plaintiffs in error.

Nye & Oldham, for defendants in error.

DICKMAN, C. J. (after stating the facts).—The finding of facts by the Circuit Court discloses that the conveyance by Jesse Pride to George Andrew was not intended by him as a gift; that it was made without consideration to the grantor, and without any agreement entered into by the grantee to reconvey the property described in the deed, that the conveyance was made without any fraud or undue influence on

the part of the grantee, and was made by the grantor with the intent and for the purpose of hindering, delaying and defeating the seizure or application of the property to the satisfaction of the claim then pending against him in the Circuit Court of Pleasants county, W. Va. Section 4196, Rev. St. Ohio, provides as follows: "Every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." While such a conveyance with intent to defraud creditors is, as against creditors, thus made absolutely void, the principle is well settled that such a conveyance is good between the parties, and no remedy is afforded the fraudulent grantor or his heirs to reclaim the property. While the fraudulent grantee, from a sense of his moral duty, ought to give back the property to him from whom he received it, yet the law, to discourage frauds, will not compel him to restore it to the fraudulent grantor: *Swift v. Holdridge*, 10 Ohio, 230. The doctrine has been adjudicated by a great weight of authorities that neither party to a fraudulent conveyance can be aided in a court of justice, but that they will be left in exactly that position in which they have placed themselves by their covinous and fraudulent transactions, and that the fraudulent grantor will not be permitted to impeach his deed, or to revoke or rescind such executed contract. There are cases, however, seemingly at variance with this rule, in which aid was extended to grantors who were *in delicto*, but not *in pari delicto*, with the grantees. But these cases are exceptions to the well-defined and almost universal rule, and rest upon facts not existing in the case before us. Where there are different degrees of guilt as between the parties to the fraudulent or illegal transaction, it was said in *Roman v. Mali*,

42 Md. 513, that, as an exception to the general rule, if one party act under circumstances of oppression, imposition, undue influence or at great disadvantage with the other party concerned, so that it appears that his guilt is subordinate to that of the defendant, the court in such case will relieve. In *Fletcher v. Fletcher*, 2 MacArthur, 38, an action of slander had been commenced against the grantor and his wife, and the conveyance was executed to the defendant to protect the real estate therein described from the result of the action at law, upon an agreement with the defendant that, as soon as the action was dismissed, or decided in favor of the grantor and his wife, he would reconvey the property to the grantor, his heirs or assigns. It was held that such an averment was fatal to the bill of complaint, and that a court of equity would not interpose to set the conveyance aside, but would leave the parties to the consequences of their own act. It was conceded, however, that a court of equity might assist the grantor where circumstances were shown to exist which recognized its interposition on other grounds of settled equity jurisdiction, "such as fraud in procuring the deed, imposition by the grantee, a violation of some fiduciary relation, an abuse of confidence, delusion or the like on the part of the grantor at the time of executing the deed." See, also, *Pinckston v. Brown*, 3 Jones Eq. 496; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Freelove v. Cole*, 41 Barb. 318; *Ford v. Harrington*, 16 N. Y. 285; *Holliway v. Holliway*, 77 Mo. 396; *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93; *Barnes v. Brown*, 32 Mich. 146. In commenting upon the foregoing and other cases of like tenor, Mr. Wait, in his work on *Fraudulent Conveyances* (§ 401), very forcibly says: "While it is possible to deduce from them a general principle that degrees of guilt will be recognized in such transactions, and that grantors may, in certain cases, reclaim the property fraudulently alienated where the transaction was superinduced by the unfair action of a vendee who occupied some relation of confidence which

enabled him to unduly influence the vendor, yet a very clear case, with well-defined reasons for excepting it from the general rule, must be presented. Debtors contemplating fraudulent alienations should draw little encouragement from these exceptional cases, for as a general rule, after passing through the troubled waters of insolvency, they will find themselves stripped of the power to reach or recover the secreted property in the hands of their fraudulent grantees. The ancient rule, '*in pari delicto melior est conditio possidentis*,' is not to be easily uprooted, and must not be considered as overthrown or abrogated by these cases."

It is contended that the deed from Pride to Andrew was not made with intent to defraud creditors, because the result of the litigation in West Virginia showed that the claim against Pride was without any merit, and that, consequently, the claimants were not, and never had been, his creditors. The question therefore arises whether a conveyance of property by the owner, during the pendency of an action, for the purpose of defeating a judgment that may be rendered therein against him, can be set aside at the instance of the grantor or his heirs after judgment has been rendered in his favor in the pending action, the conveyance having been made without the practice of any fraud or undue influence by the grantee, and without any promise by him to reconvey the property. One of the common incentives of a grantor to transfer his property in fraud of his creditors is the commencement of legal proceedings against him to subject his property to the payment of his debts. When such transfer is made of a grantor's whole estate while a suit is pending against him, it becomes a badge of fraud, calling for explanation and justification by proof. And when it is avowed that the secret intent and purpose of the conveyance was to hinder and defeat the seizure or application of the grantor's property to the satisfaction of a judgment, if recovered against him, he confesses to a willingness and design to thwart the judgment of the court if contrary to

his opinion and wishes. If the plaintiff in the suit does not succeed, the grantor, on the ground that the plaintiff has turned out not to be a creditor, then invokes the aid of the very court, it may be, whose judgment he has endeavored to make valueless, to restore to him the property which he had deeded to another under a secret trust. If the plaintiff does succeed in his action, and thereby places himself on the footing of a creditor, he may then be forced to assume the burden of overthrowing the fraudulent conveyance made by the grantor. Courts of law are the effective agencies by which creditors secure their rights, and it is to be presumed that their judgments and decrees will be founded on justice. If the grantor of property, therefore, not being certain whether his apprehensions as to the recovery of a judgment against him in a pending suit are well or ill founded, acts as if the judgment would be against him, and by conveyance puts his property in the name of another under a secret trust, he cannot complain if a court of equity leaves the parties in the position in which it finds them, and declines to set aside the conveyance.

The statute contemplates a grant or conveyance with intent to defraud creditors. It recognizes the moral quality of the act as residing in the intention. The finding of the facts discloses that the conveyance was made by Pride to Andrew with the intent, on the part of the grantor, to hinder, delay and defeat the application of the property to the satisfaction of the claim in litigation in West Virginia, in case judgment should afterwards be recovered against him thereon. In other words, his design was that, if a court of justice should find the claim against him to be good and valid, his conveyance would serve to render nugatory the judgment recovered in the suit by his creditors. The claimants, it is true, did not succeed in establishing their claim, but, in view of the avowed intention of the grantor in the event of the claimants' success, a court of equity cannot so far regard with favor the conduct of the grantor

as to aid in putting him and the grantee back in the condition in which they were before entering into the transaction.

The fact that the suit resulted in favor of Pride can have but little bearing on the question of his fraudulent intent in conveying all his property to Andrew at the nominal consideration of \$2,000, but in reality without any consideration whatever. In many cases such favorable result might well have been brought about by the conveyance itself, in causing the creditor to abandon his suit, rather than enter upon the task of pursuing the property. If, before the suit in West Virginia had terminated, Pride had instituted proceedings to set aside his deed to Andrew, a court of equity would not, we think, have waited, to abide the result of the suit, but would have refused to cancel the deed if convinced that it had been executed to defraud the claimants in the event of their recovering judgment. It would have been enough to know that the deed had been prompted by the fraudulent motive of placing the grantor's property beyond the reach of one then seeking to establish the validity of a claim against him in a court of justice, in case the claimant succeeded in his suit.

Our attention has been called to several cases in support of the contentions of the defendants in error. We need refer to only two of them. *Harris v. Harris' Ex'r*, 23 Grat. 737, as stated in the syllabus, was an action of debt, brought by the executor of Gabriel Harris against George Harris, to recover the amount of three bonds executed by George Harris to his father, Gabriel Harris. George tendered a special plea that at the time of the execution of the bonds he owed nothing to Gabriel, and that the consideration of the bonds was as follows: In 1866 four suits at law were pending against him in the county (naming the plaintiffs) to recover damages for trespass during the Rebellion in impressing horses, etc., by him under orders of the Confederate government, he being an officer of the army under

that government. He did not regard these claims as debts or just liabilities on his part, but, owing to the constitution of the courts and juries at that time, he feared they might be enforced against his property. He was informed by his counsel that the result was uncertain. He conferred with his father, who advised him to secure his property against these claims. The plan adopted was for him to execute to his father the bonds sued on, antedated, with the distinct understanding that they were only to be used and treated as obligations to claim priority over the plaintiff in case of necessity, and, if unnecessary, were to be handed back to the defendant. The bonds were executed under this understanding, and upon no other consideration; wherefore Gabriel Harris and his executor were bound to re-deliver the bonds to the defendant, because the suits had been dismissed in 1867, before the death of Gabriel, and the bonds were therefore null and void, and to be surrendered. On motion of the plaintiff the plea was rejected. The court held that the averment by the defendant of his fears that the courts and juries would not do him justice could not avail him, as the court must presume that no injustice would be perpetrated in regular legal proceedings had in the forum where such proceedings were pending. It was held, further, that the plea was not good on the ground that the facts stated would entitle him to relief in equity, because his ground of relief was his own fraud. In *Tantum v. Miller*, 11 N. J. Eq. 551, the complainant, who was threatened with a prosecution for larceny, conveyed to her niece several tracts of land. Although entirely innocent of the charge, yet, being ignorant of the law, and the effect of such prosecution, and being informed by persons with whom she was well acquainted, and in whom she confided, that, if such criminal prosecution was urged against her, she might be deprived of her property, and that the same might be taken from her by process of law, she was induced by such advice, and through the influence of her fears, to make the convey-

ance; her niece, the grantee, intending in due time to re-convey the property to her. The chancellor said: "If this bill can be maintained, the court must take the broad ground that, if a person charged with a crime conveys away his property for the avowed purpose of protecting it against the consequences of his conviction, if he escapes such conviction, a court of equity will aid him in recovering back his property. . . . The complainant made the conveyance for the unlawful purpose of placing it beyond the reach of the law if the threatened prosecution should prove successful. . . . This was against public policy. This court cannot aid a person under such circumstances." The two cases last cited go to sustain the position that, where an owner, in view of a possible judgment being rendered against him, conveys his property with intent to defeat such judgment, he cannot, after judgment in his favor, recover back his property, even where the grantee has promised to reconvey. In our opinion, the judgment of the Circuit Court should be affirmed. Judgment accordingly.

A voluntary deed or settlement made *pendente lite* and before decree or verdict, is as to creditors, fraudulent: *Crowley v. Elworthy*, L. R. 12 Eq. 158; *Colbert v. Sutton*, 5 Del. Ch. 294; *Burling v. Bishop*, 29 Beav. 417; *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347; so if made on the eve of an action against the grantor or settler: *Burling v. Bishop*, 6 Jur. (N. S.) 812; or in fear of litigation: *Dunaway v. Robertson*, 95 Ill. 419; so where he is subject to a liability which will probably be enforced by action or suit, as where he is liable to a claim for damages, whose amount is not yet ascertained: *Westmoreland v. Powell*, 59 Ga. 256; *Been v. Botsford*, 13 Conn. 146; or to a fine whose amount is not yet fixed: *Williamson v. Wachenheim*, 58 Iowa, 277; and in cases of this kind no distinction is made between debt properly so-called and a liability for a tort: *Scott v. Hartman*, 26 N. J. Eq. 90; *Post v. Stiger*, 29 Ib. 558; *Jackson v. Myers*, 18 Johns. 425; *Clapp v. Leatherhill*, 18 Pick. 138; *Fox v. Hills*, 1 Conn. 295; *Barling v. Bishop*, 29 Beav. 417. In

some cases it is held that when a liability is merely contingent, it will be enough to render the deed fraudulent that there is a reasonable probability that it will be enforced by action, as the liability of a surety upon a liquor bond given to secure payment of damages under a civil damage act, even before any penalty has been incurred: *State v. Burkholder*, 30 W. Va. 593; *People v. Rice*, 79 Mich. 354; but it has been held that a possible liability for fraud in the sale of land, which has not been asserted by action or demand, is not such a liability as will require the grantor to retain assets to meet: *Sanders v. Logue*, 88 Tenn. 355.

A deed given by one against proceedings to enforce the payment of alimony, or for a separate maintenance, have been commenced by his wife is fraudulent: *Bourlaugh v. Bourlaugh*, 68 Pa. 495; *Tyler v. Tyler*, 126 Ill. 575.

A fraudulent grantor has no standing in equity to ask that his fraudulent deed be set aside and a reconveyance decreed when the deed has fulfilled its purpose, or when the emergency which led him to resort to the fraud has passed: *Dunaway v. Robertson*, 95 Ill. 419; *Tyler v. Tyler*, 126 Ill. 525; *Parrott v. Baker*, 82 Ga. 126; *Dougherty v. Miller*, 50 N. J. Eq. 529; *Simon v. Gibson*, 1 Yeates, 291; *Reichardt v. Castator*, 5 Binn. 109; *Sherk v. Endress*, 3 W. & S. 255; *Eyrick v. Hetrick*, 13 Pa. 488; *Huey's Appeal*, 29 Ib. 219; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Story Eq. Juris.*, § 381; *Bispham Eq.*, § 248. This is frequently expressed by saying that the deed of settlement is binding, or even "perfectly valid and binding between the parties themselves:" *May on Fraudulent Conveyances*, 464. It is only the creditors who have the right to complain, as said by Sir WILLIAM GRANT, M. R., in *Curtis v. Price*, 12 Ves. 103. "Satisfy the creditors and the settlement stands good:" *Smith v. Cherrill*, L. R. 4 Eq. 390; *Tanqueray v. Bowles*, L. R. 14 Eq. 157; *Pauncefort v. Blout*, 3 Co. 82 a; *Shaw v. Jeffery*, 13 Moo. P. C. 452; *Reed v. Thoyts*, 6 M. & W. 410. The result is, of course, the same, so far as the decision of most, if not all, cases which can arise is concerned; but it is suggested equity proceeds rather on the ground that it will not interfere to apportion justice and blame between two wrong-doers, and will neither enforce nor relieve against fraud at the prayer of a party to the

fraud, rather than on the ground of the affirmance of the validity, even between the parties, of a fraudulent conveyance. That equity will base a refusal to interfere on this ground has been decided over and over again.

Fraudulent conveyance by corporation—Division of proceeds among stockholders—Consideration—Rights of creditors.

FORT PAYNE BANK v. ALABAMA SANITARIUM

ET AL.

(Supreme Court of Alabama, May 18, 1894.)

Where a corporation conveys all its property to another corporation, and receives from the latter, therefor, mortgage bonds on the property for the price, the transfer is not without consideration and void.

Where the stockholders and officers of an insolvent corporation convey all its property to another corporation in consideration of mortgage bonds issued by the grantee on the property, and, without providing for the debts, divide the bonds, *pro rata*, among themselves, such transfer is a fraud on the creditors of the grantor, though such creditors knew of and acquiesced in the transfer at the time; and such creditors may set it aside, whether the grantee be a stranger to the grantor, or a new corporation formed by the shareholders of the latter.

In an action against such corporations, stockholders, etc., to set aside such transfer, where the bill is sufficient, and there is a prayer for general relief, and decrees *pro confesso* are entered against several stockholders of the grantor corporation, it is error to dismiss the bill, as to them, on final hearing, though the evidence is insufficient to support the bill, as to the answering respondents.

Appeal from Chancery Court, De Kalb county; S. K. McSPADDEN, Judge.

Bill by the Fort Payne Bank against the Alabama Sanitarium and others. There was a judgment dismissing the bill, and complainant appealed.

The bill in this case was filed by the Fort Payne Bank, on September 28, 1892, against the Alabama Sanitarium, the Fort Payne Educational Association, E. W. Godfrey, as

trustee, C. O. Godfrey and eighteen other defendants. The bill was filed by the complainant as a non-secured creditor of the Alabama Sanitarium, it being alleged in said bill that it was the owner of the note for \$6,672.95, which had been given by the Alabama Sanitarium to the Bank of Fort Payne, and had been subsequently transferred to the complainant. The validity of the note sued on, and complainant's ownership of it, are fully established by the evidence in the cause. Its original consideration, as shown, was money loaned by the Bank of Fort Payne to the Alabama Sanitarium, renewed, from time to time, until, on March 31, 1891, this note was given for the debt and accrued interest. The bank of Fort Payne pledged this, and other obligations due it, to the First National Bank of Chattanooga, Tenn., as collateral security for a loan by said bank to it, of about \$12,000, and these collaterals, on default of the payment of said loan by said borrowing bank, were sold by the Chattanooga bank, and C. O. Godfrey became the purchaser of them, and afterwards this and other notes so purchased by him were transferred to the complainant—the Fort Payne Bank—a different corporation from the Bank of Fort Payne. The evidence also shows that C. O. Godfrey was, at the time he purchased said note, and the others at said sale, a director in the plaintiff corporation, and it tends to show he purchased said notes for the complainant.

Referring to such further facts as are necessary for an understanding of the case, it appears that the Alabama Sanitarium was chartered under the laws of this state, on the 20th of March, 1889, with C. O. Godfrey, A. S. Loventhal and E. W. Godfrey as incorporators; that the capital stock was \$40,000, and was all subscribed by these three incorporators, and C. O. Godfrey was elected president, and E. W. Godfrey, secretary of the company; and it is not made to appear what other persons besides these three, except the president and cashier of the Bank of Fort Payne, ever be-

came stockholders of said company, or that there was ever any change in the incumbency of the offices.

The evidence shows that the original note for the money borrowed, for which the one in suit was a renewal, was indorsed by C. O. Godfrey and A. S. Loventhal, but the one in suit does not bear their indorsement. It is not shown with certainty how their names as indorsers on the notes disappeared. But the evidence does show that there were negotiations between the lending bank and C. O. Godfrey, for their release, by his giving collateral security by way of a mortgage on town lots, and the transfer to the bank of notes of other parties which were secured by liens on land. Whether this negotiation was ever perfected or not is not disclosed further than that such security for said note was given and the names of said indorsers no longer appear on the note. The evidence also tends to show, in this connection, that the collaterals given by said Godfrey to secure said note, were, at the time, deemed ample for the purpose. It is an admitted fact that on the 24th of June, 1890, the Fort Payne Educational Association was incorporated, under the general incorporation laws of the state, with nine persons as incorporators, whose names are given, no one of whom was an incorporator or stockholder, so far as is shown, in the Alabama Sanitarium, except C. O. Godfrey. He was an incorporator and stockholder in the sanitarium and an incorporator of the educational association. It does not appear that there were any stockholders in the association. It was shown that a meeting of the stockholders of the sanitarium was held at Fort Payne, on the 16th day of August, 1890, at which meeting a resolution was passed to the effect that whereas the educational association, a corporation duly organized under the laws of Alabama, had proposed to purchase the hotel, land and entire property of the sanitarium, and to issue bonds for the sum of \$30,000 on said property, due and payable in five years after date, bearing interest at the rate of six per

cent. per annum, and offered in payment of said property, \$25,000 of said bonds, it was unanimously resolved that said proposition be, and it was accepted, and that said bonds should be accepted in full payment for all of said property; and the president and secretary were authorized and instructed to execute a warranty deed to said property to said educational association. The following resolution was also adopted at that meeting: "That the board of directors be instructed to issue a dividend of said bonds, when same be received, and they be authorized to wind up the affairs of the company." The minutes of this meeting fail to show, and it does not elsewhere appear in evidence, who the stockholders composing this meeting, and who the officers—president, secretary and directors—of the corporation were. It is not disputed that the sanitarium, acting under this resolution, did, on the 23d of January, 1891, execute and deliver its deed of conveyance of said property—which was all it owned—to the educational association. On the 18th day of August, 1890, at a meeting of all the trustees of said association, it was resolved and voted to issue a series of bonds from 1 to 300, both inclusive, for \$100 each, amounting in the aggregate to \$30,000, payable September 1, 1895, at the First National Bank of Fort Payne, in the city of Fort Payne, Ala., to bear interest at the rate of six per cent. per annum, payable semi-annually, on the first days of March and September, each year, which bonds were to be devoted solely to the payment for the academy buildings—the sanitarium property—and the needs and purposes of the school. On the 27th of January, 1891, said educational association executed its deed of trust, in accordance with said resolution, to the First National Bank of Fort Payne, as trustee, to secure the issue of the bonds of the corporation as provided in said resolutions, and delivered to the sanitarium \$25,000 of said bonds in full payment for said property, retaining \$5,000 of the issue. This deed was filed for record in the office of the

Probate Court of De Kalb county, on the 30th of January, 1891. The complainant bank was not organized and did not commence business until January, 1892, nearly two years after the sanitarium, at a meeting of its stockholders, resolved to sell its property, wind up the corporation, and divide the proceeds of the sale among the stockholders, and about nineteen months after the educational association purchased said property, and paid for it in the issue of its bonds. The First National Bank of Fort Payne, the original trustee in the deed, resigned, and E. W. Godfrey was duly appointed trustee in its place. Default having been made in the payment of the interest on the bonds, E. W. Godfrey, as trustee, proceeding under and according to the terms of the deed, advertised said property for sale on the 4th day of October, 1892.

The prayer of the bill is, (1) for an injunction against the sale of said property by said Godfrey; (2) that a receiver be appointed to take charge of the property; (3) that on final hearing of the cause said deed of the sanitarium to the association be canceled and set aside as voluntary and fraudulent as to complainant and other creditors of the sanitarium, and that the property therein described be subjected to the payment of complainant's debt; (4) that the issue of said bonds be canceled and held fraudulent and void; and (5) for general relief. As grounds for relief thus prayed for the bill makes the following specific charges: (1) That the recited consideration of \$25,000, contained in the deed of the sanitarium to the association, was false and fictitious, that there was, in fact, no consideration paid, and the transfer of the property was wholly without consideration. (2) That the trustees of the association were the owners of stock in the sanitarium, and the transfer of the property was, in fact, to the same parties who owned stock in the sanitarium; and they knew the condition of the affairs of the sanitarium and knew of the indebtedness to the Bank of Fort Payne, and knew and were fully advised

of all the facts in relation to the transfer. (3) That the bonds were issued by the association and were delivered to the owners of the stock in the sanitarium, and that all the defendants to the bill, except the sanitarium, and the association, were owners of the bonds of said association, and were owners of the stock of the sanitarium; and said bonds were issued and delivered to the present holders of the bonds in lieu of stock in the sanitarium, this being the only consideration of said bonds. (4) That said issue of bonds was fraudulent, unlawful and unauthorized; that the transfer of all of the property of the sanitarium to the association was a fraud on complainant and the creditors of the sanitarium, and hindered, delayed and defrauded them; that the sanitarium and the association are insolvent, and if the sale of the property advertised by said Godfrey, as trustee, takes place, the proceeds arising from it will be distributed among the persons who own and hold the said bonds; that no assets will be left out of which complainant can collect its debt, and it will be left without recourse in its collection. On October 1, 1892, after the execution of the proper bond, a writ of injunction was issued, restraining the trustee from selling the property, which originally belonged to the Alabama Sanitarium, or in any manner interfering with the same. On October 5, 1892, a receiver was appointed by the register in accordance with the prayer of the bill.

Of the parties defendant, ten were non-residents, against nine of whom, after publication, the bill was taken as confessed. The bill was not taken as confessed against M. H. Pennell, one of the defendants, nor was he served with subpoena. All the defendants, except those against whom decrees *pro confesso* were taken and said M. H. Pennell, filed answers, in which many of the allegations of the bill, down to § 7—in which the charges on which relief is sought began to be averred—were admitted to be true; but, beginning with § 7, all of said charges are positively

and specifically denied, except that C. O. Godfrey was a stockholder in the sanitarium and a trustee of the association. The answers of the two corporations deny the allegations that the trustees of the association were all owners of stock in the sanitarium, and aver that six out of the nine trustees whose names are given never did own stock therein, and knew nothing of the affairs of the sanitarium, and of its indebtedness to the Bank of Fort Payne, and never had any interest, directly or indirectly, in said corporation, either at the time of the transfer of said property to the association, or at any other time; that no one of the trustees of the association had any personal interest of any character in the property of the association, or in any property that might be conveyed to it; that the association delivered the \$25,000 of its bonds, when issued, directly to the stockholders of the sanitarium, with the consent and by the direction of the officers of the sanitarium, and with the knowledge and consent of the Bank of Fort Payne; that W. P. Rice and F. H. Toby were at that time president and cashier of said bank, and each of them were owners of stock in the sanitarium, and each received his proportion of the share of said bonds. It is further denied that all the defendants named in the bill, except the sanitarium and the association, were owners of said bonds, and it is averred that the defendants, E. W. Godfrey, C. O. Godfrey, H. B. Hill, A. Conant, J. F. Brown, Sidney Sargent, G. M. Baker, J. W. Spalding, Fort Payne Hardware Company and Rebecca Loventhal, were not owners of any of said bonds at the time of the filing of this bill, and had not been such owners for some time. Mrs. Loventhal denies the allegations of fraud on which the bill rests for relief, denies that she owns any of said bonds or has any interest in them, or that any of them were delivered to her for stock in the sanitarium. The other defendants who were served deny the allegations of fraud as averred in its paragraphs from 7 to 13 inclusive. Neither one of the witnesses examined

in behalf of the complainant states any facts of value to the complainant on the controverted facts in the case. Hemp-hill, either as assistant cashier, or as cashier, was connected with the Bank of Fort Payne from March, 1889, to April, 1892, and is the cashier of the plaintiff bank, organized in July, 1892. He does prove that F. H. Toby, the cashier of the Bank of Fort Payne, the then owner of the note sued on, received some of the bonds of the association. F. H. Toby testified that he was the cashier of the old bank from and including the year 1889 to February, 1892; that he knew of the distribution of the bonds of the sanitarium among its stockholders; that he received some of them, and that Mr. Rice, who was president of the Bank of Fort Payne at the time, was a stockholder and received some of the bonds; that he knew the association, after it was organized, proposed to issue its bonds and purchase the property of the sanitarium with the bonds. He also testified that he was informed the transfer of the property was made, and the bank took no steps to prevent it, and gave no notice to and made no demand on the association for the claim it held against the sanitarium. Who were the stockholders of the sanitarium, who were the trustees of the association, who were the parties who received the bonds of the sanitarium in distribution for their stock therein as alleged in the bill, and who were the present owners of the said bonds, was not shown or attempted to be shown by the complainant. It does appear, as stated above, that C. O. Godfrey was a stockholder and incorporator of the sanitarium, and was also a director in the Bank of Fort Payne. For the defendants it was shown by the depositions of the trustees of the association, examined as witnesses in the case, that they were not, at the time of the conveyance of said property to the association, acquainted with the financial affairs of the sanitarium, and did not know and had no information of the complainant's debt, or any other debts of said corporation; and three of them swear, that so far as

they knew, neither of the other trustees ever had any such information. The witness Train swears that there was no fraud or attempt at concealment in the transfer, and it was not made with the view of avoiding any debt or liability of the sanitarium—as to the existence of which he was ignorant—but was made in good faith for valuable consideration, to secure further educational advantages to the youths of Fort Payne. On appeal to the chancellor from the order of the register appointing the receiver, and on the respondent's motion to dissolve the injunction, for want of equity in the bill, and on the sworn denials in their answer, the chancellor, on October 14, 1892, annulled the appointment of the receiver, and ordered the property restored to the possession of the trustee and dissolved the injunction. Upon the final hearing of the cause, on pleadings and proof, the chancellor adjudged that the complainant was not entitled to the relief prayed for, and decreed that its bill be dismissed. The present appeal is prosecuted by the complainant; and it assigns as error the interlocutory decree annulling the order appointing the receiver and dissolving the injunction, and the final decree of the chancellor dismissing the bill.

Davis & Haralson and *Howard & Ewing*, for appellant.

George D. Parks, for appellees.

HARALSON, J. (after reciting the pleadings and evidence *ut supra*)—1. On the foregoing statement of the pleading and evidence in this cause, it is insisted that the conveyance of the sanitarium to the association was without any consideration, voluntary and void. So far as this branch of the contention goes it must be said that a corporation has the same right to dispose of its property for cash or on credit as any natural person has, and a promise to pay in either case constitutes a valuable consideration to uphold a deed: *Bump. Fraud. Conv.* 225. Unaffected by other questions in the case the transaction between the sani-

tarium and the association was no more than the ordinary sale by one person to another of his property on a credit, for which the purchaser executed his notes to the vendor, with a deed of trust or mortgage on the property sold, to secure the payment of the purchase-money.

2. It is alleged, however, as we have seen in the statement of the case, that the parties whose names are given, who were the trustees of the association, were the owners of the stock in the sanitarium, and knew of the indebtedness of that corporation to the Bank of Fort Payne; that the bonds were issued and delivered to the owners of said stock, and that the present owners of the bonds were the owners of said stock. These allegations, so specifically denied in the answers, have not been proved, nor attempted to be proved, by complainant, but have been, to a large extent, at least, disproved by defendants. A. S. Loventhal and E. W. Godfrey, individually, two of the three original incorporators of and stockholders in the sanitarium, and E. B. Cook, alleged to have been a stockholder, it is noticeable have not been made parties. As for C. O. Godfrey, it appears he was a stockholder in the sanitarium and a trustee in the association, and he is the only party in the case who is shown definitely to fall within the sweeping averments of the bill. But the proof is not satisfactory to show that he acted with any actual fraudulent design. It was manifestly greatly to the interest of the stockholders of the sanitarium to dispose of their property. It was idle and had failed for the purposes for which it was intended, and liable to great depreciation. Said Godfrey seemed to make ample provision at the time to secure the debt, which was the only one the corporation owed, by giving collaterals to the bank, and the course the bank authorities pursued indicates they regarded said debt as protected. He and the stockholders of the sanitarium acted openly in what they proposed to do in the sale of the property; they held a meeting of the stockholders and agreed to accept the proposition of the association for the

purchase, ordered the sale to be made and passed a resolution to distribute among the stockholders the bonds to be given for the purchase, and wind up the corporation. The president of the bank that held this debt at the time and its cashier were both stockholders in the sanitarium; they each knew of what was being done, as it appears, and each received his share of the bonds. The cashier deposes that the bank did not forbid the sale, but silently acquiesced, and gave no notice of its debt to, and made no demand on the association for it. The deeds were put upon record disclosing the whole transaction, and in the lifetime of the bank for eighteen months or more afterwards, these proceedings were not questioned. The trustees of the association, outside of C. O. Godfrey, appear to have had no interest to subserve in committing a fraud or other purpose except to buy the property by the issuance of the bonds of the purchasing corporation for the purposes of establishing educational advantages for the children of Fort Payne. And, as to said C. O. Godfrey, as before stated, it is not clear that he was actuated by any bad design. Without reference, however, to any good purposes of the two corporations or their officers, if it were a fact that the parties in the sanitarium as stockholders sold the property for those bonds and divided them among themselves, leaving this debt of the plaintiff unprovided for, it would be a legal fraud on the complainant. No principle is better settled and more equitable than that the assets of a corporation are a trust fund for the payment of its debts, vested in the hands of trustees to be preserved by them to secure the creditors of the corporation. As the result of an examination of the authorities on the subject we cannot do better than adopt what Mr. Morawetz has compiled. After stating that if a corporation should become insolvent after having distributed a portion of its capital among its shareholders, or otherwise transferred it without value, its creditors, whose equitable claims had attached before the distribution or transfer,

would be entitled to follow the capital and apply it in payment of their claims, he says: "The same rule applies if a corporation, without providing for its creditors, should transfer its property to another corporation, unless the latter is a purchaser for value; the corporation receiving the transfer would, in that case, be liable to the unpaid creditors to the extent of the property received without value. It would be immaterial whether the corporation receiving the property was a stranger to the transferring company or a new corporation formed by the shareholders of the transferring company to supersede the latter in business, or a corporation formed as the result of a consolidation. In either event the unpaid creditors would be entitled to set aside the transfer, so far as it was a fraud on their rights. If the corporation was controlled by the same persons as the company executing it, or if the real parties in interest in both companies were substantially the same the burden of showing that the transfer was made in good faith for value would fall on those asserting its validity against unpaid creditors." Shareholders, says Mr. Cook, "are bound to take notice of the true character and condition of the capital stock, and they cannot escape liability on account of their ignorance. If a dividend has been paid out of the capital stock the stockholders are conclusively presumed to have known it, and are liable to an action for repayment. They cannot claim to hold the position of innocent *bona fide* holders:" 2 Mor. Priv. Corp., §§ 790, 791; Ang. & A. Corp., §§ 599-604; 1 Cook, Stock & Stockh. & Corp. Law, § 548; Railroad Co. v. Branch, 59 Ala. 139; Smith v. Huckabee, 53 Ala. 191; Bank of St. Mary's v. St. John, Powers & Co., 25 Ala. 566; McDonell v. Agricultural Co., 38 Ark. 27; Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136.

3. On the evidence before us we do not feel authorized to hold that this deed should be set aside as being without consideration, fraudulent and void. There is too much

averred and too little proved. To authorize relief in such a case there should be a closer agreement between the allegations and proof. The bill, however, should not have been dismissed. Besides the prayer for special relief there was added the one for general relief, under which, if it were shown that any of the defendants, being stockholders of the sanitarium, received a dividend in the bonds of the association, they were liable to be held to account, ratably, to the extent of their holding if necessary, for the debt of complainant. Decrees *pro confesso* were rendered against nine who were alleged to be in this category, and the bill should not have been dismissed as to them.

4. We have, at considerable length and much particularity, reviewed the facts as they will be reported, and stated the principles of law governing this case, with the view that on another trial the bill may be so framed as to parties and with fuller and more definite proofs corresponding with the averments, the court below may make a final disposition of it. The decree dissolving the injunction is not disturbed, but should the complainant amend its bill and desire another injunction against the sale by the trustee and present a case authorizing it, it can make application therefor and it will be granted.

5. The case was not at issue, and the very unsatisfactory proofs taken by deposition, without an agreement to obviate it, will have to be retaken ; but this error is not available on appeal to complainant, through whose fault the error was committed : *Vaughan v. Smith*, 69 Ala. 92.

Reversed and remanded.

The assets of a corporation are, in a certain sense at least, a trust fund for its creditors. The doctrine that such assets constituted a trust fund was first announced with considerable breadth of expression by STORY, J., in *Wood v. Dummer*, 3 Mason, 308, and has been sustained by many authorities, amongst others by *Sanger v. Upton*, 91 U. S. 56 ; *County of Morgan v. Allen*,

103 Ib. 498; *Richardson v. Green*, 133 Ib. 30; *Thompson v. Reno Savings Bank*, 9 Nev. 103; *Marshall Foundry Co. v. Killian*, 99 N. Car. 501; *Lane's Appeal*, 105 Pa. 49; *Bell's Appeal*, 116 Ib. 88; *Lee v. Imbrie*, 13 Oreg. 510; *Cole v. Millerton Iron Co.*, 113 N. Y. 164; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Goodwin v. McGehee*, 15 Ala. 232; *Jones v. Arkansas Mechanical Co.*, 38 Ark. 17; *Union Nat. Bank v. Douglass*, 1 McCrary, 86; *South Bend Toy Mfg. Co. v. Pierre Fire & M. Ins. Co. (S. D.)*, 56 N. W. 98. This doctrine is not, however, to be carried to the extent of holding that the solvent corporation holds its property subject to any lien in favor of its creditors; the trust is not a strict one, and the explanation of the use of the expression given by BREWER, J., in *Hollins v. The Brierfield Coal and Iron Co.*, 150 U. S. 371, is that it means "that when a court of equity does take into its possession the assets of an insolvent corporation it will administer them on the theory that they in equity belong to the creditors and stockholders rather than the corporation. In other words, and that is the idea which underlies all these expressions in reference to trust, in connection with the property of a corporation," continues the learned judge, "the corporation is an entity distinct from its stockholders as from its creditors. . . . Becoming insolvent the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first for the creditors and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation or its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession of the assets by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditors or stockholders." And see *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148; *Fogg v. Blair*, 133 Ib. 334; *Hawkins v. Glenn*, 131 U. S. 319; *Sabin v. Columbia River Lumber and Fuel Co.*, 25 Oreg. 15. Mr. Taylor, in his work on Corporations, after stating the doctrine of "trust fund" with great fullness, and stating as a conclusion therefrom "that the beneficiaries of the trust, shareholders or creditors, can claim such funds in the hands of any one who has not in good faith given value for them without notice of

the trust," comes to the following conclusion, "Accordingly, a corporation cannot place its assets beyond the reach of its creditors merely by going through a process of reincorporation, taking a new name, transferring without consideration the assets of the old corporation to the new one, and issuing shares in the capital stock of the new corporation to holders of shares in the capital stock of the old. And if the stockholders of one corporation organize another and transfer to it all the property of the former, without paying the former's debts, the obligations of the old company may be enforced against the new one to the extent of the assets transferred to it:" Taylor, Corporations, §§ 656, 657. Whether the conclusion that such a transfer of assets as is spoken of by Mr. Taylor is unavailing as against creditors, can be better justified by the line of reasoning adopted by him or by the position which finds support in the doctrine of GRAY, J., in *Wabash, St. Louis & Pac. R. Co. v. Hare*, 114 U. S. 887, "It is also true in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor without authority of law and in fraud of existing creditors is void as against them," may be questioned, but that such transfers as are mentioned in Mr. Taylor's text are void as to creditors is well settled, and it would seem to be immaterial whether the corporation receiving the property be a stranger to the transferring corporation, a new one formed by stockholders of the old to replace the other in business or a corporation formed as the result of a consolidation: *Morawetz, Corp.*, § 791; *San Francisco R. R. v. Bee*, 48 Cal. 398; *Hancock v. Holbrook*, 40 La. Ann. 53; *Hibernia Ins. Co. v. St. Louis, etc., Transportation Co.*, 13 Fed. Rep. 516; *Booth v. Bunce*, 33 N. Y. 139; *Barclay v. Quicksilver Mfg. Co.*, 9 Abb. Pr. (N. S.) 283; *Same v. Same*, 6 Lans. 25; *Kelly v. Mariposa Land, etc., Co.*, 4 Hun, 632; *Brewer v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *National Bank v. Texas Investment Co.*, 74 Tex. 421; *Montgomery, etc., R. R. Co. v. Branch*, 59 Ala. 139; *Jones v. Arkansas Mechanics, etc., Co.*, 38 Ark. 17.

Contracts—Restraint of trade—Corporations—Monopoly.**OAKDALE MFG. CO. ET AL. v. GARST.**

(Supreme Court of Rhode Island, February 27, 1894.)

A contract by which three of four companies in New England, engaged in the manufacture of oleomargarine, consolidate as a corporation, partly for the purpose of stopping the sharp competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as constituting a monopoly.

Citizens of one state may form a corporation under the laws of another state to do business in the state of their citizenship.

An agreement by persons, forming a corporation under which they shall unite their business of manufacturing oleomargarine, that none of them shall separately engage in the business for five years, without any limitation as to territory, they having in contemplation an extensive business, which should include the building up of a foreign trade, is not an unreasonable restraint of trade.

Bill in equity by the Oakdale Manufacturing Company and others against Sebastian Garst for an injunction to restrain the defendant from carrying on business in violation of the following agreement: "And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage, directly or indirectly, in any business of the same kind, or for the same purpose or purposes, as that to be carried on by the corporation to be formed; nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation or corporations engaged in the same business or business similar to the business of the corporation to be formed for the period of five years from and after the date of this agreement." The complainant, the Oakdale Manufacturing Company, was the corporation alluded to above and was organized by the other parties to the suit, under the laws of the state of Kentucky, in pur-

suance of the agreement referred to in the opinion of the court.

Arnold Green, Richard B. Comstock and Rathbone Gardner,
for complainants.

Simon S. Lapham, for respondent.

STINESS, J.—The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts and good-will of their respective concerns, at a valuation greatly in excess of the value of the property itself, taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company, to present holders, for \$60,000, although, as he says, the property it represented was worth only about \$28,000. After this he entered the same business again, and claims the right to do so upon the following grounds, viz.: (1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; (2) that the contract is void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition; (3) that one purpose of the contract was to form a corporation in violation of the laws of this state; (4) that, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the

arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates and that it was engaged to some extent in such export are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the Court of Appeals (121 N. Y. 582, 24 N. E. 834), the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, and *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660, were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will

be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, where twenty-four owners of stone quarries, on account of a ruinous competition, which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry, and engrosses the markets—tends to 'make a corner,' to use the slang of the stock and provision gamblers—it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time and persons are not necessarily restraints of trade in the general sense which is objectionable." So in *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, the defendants had sold their business of making cheese by secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to

both time and territory. The restriction under consideration, however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up: *Chafee v. Manufacturing Co.*, 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court: *Bank v. Kendall*, 7 R. I. 77; *Machine Co. v. York*, 11 R. I. 388; *Smelting Co. v. Smith*, 13 R. I. 27; *Manufacturing Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity: *Pierce v. Crompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We

can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, c. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restricted covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (French *v.* Parker, 16 R. I. 219, 14 Atl. 870), nor of space (Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in Wiley *v.* Baumgarden, 97 Ind. 66, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry-goods business for five years; and in Herreshoff *v.* Boutineau the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in Thermometer Co. *v.* Pool, 51 Hun, 157, 4 N. Y. Supp. 861, where the business was extensive, restraint within the entire territory of the United States, and in Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under which it was made;

by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the complainants are entitled to the relief prayed for.

The authorities upon the general question involved in the foregoing case (*i. e.*, how far a trade combination is lawful) are somewhat hard to reconcile. The rule laid down by Sir Frederick Pollock is that it is not unlawful for several persons carrying on business in the same place to agree to divide the business among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid because they may operate in partial restraint of

the parties' freedom to exercise their trade. But a provision that if other persons, strangers to the contract, do not employ in particular cases that one of the contracting parties to whom, as between themselves, the business is assigned by the agreement, then, none of the others will accept the employment, is bad: *Pollock, Contracts*, 311; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Jones v. North*, L. R. 19 Eq. 426; *Saratoga Bank v. King*, 44 N. Y. 89; *Hatcher v. Andrews*, 5 Bush, 561; *Guerand v. Dandeleit*, 32 Md. 561; *Grasselli v. Lowden*, 11 Oh. 349. An examination of recent cases will show that while the first part of the above rule has been frequently, it has not been always followed. In passing upon the validity of a given contract, the courts will be influenced very largely by the character of the trade which is the subject of combination, thus in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, several manufacturers of a certain kind of curtain fixture, for which they held different patents, entered into a contract with a corporation formed by them, by which the corporation agreed to buy at specified prices, all that the manufacturers made, and the manufacturers agreed to sell the goods as agents for the corporation, which should have the power to establish rates, and that if one party established an agency in any city or town, no other party should take orders for the same place; it was held that as the contract did not relate to an article of prime necessity, or to merchandise to be bought and sold in the market, but to an article of the parties' own manufacture of which they had a monopoly by their patents, as it put no restraint on production and did not affect competition from outside, it was not invalid. And see where the subject of contract or combination in trade is a patented article: *Bowling v. Taylor*, 40 Fed. Rep. 404; *Good v. Daland*, 121 N. Y. 1; *Gloucester I. & G. Co. v. Russia C. Co.*, 154 Mass. 92.

A combination which purchases distilleries, controlling three-fourths of the product in the United States and establishes rebates to exclusive customers, but does not bind the vendors of the distilleries not to engage in business or sell at other prices, except by the inducement of the rebate, is held not a violation of public policy or of the Act of Congress of July 2, 1890: *Re Corning*, 51 Fed. Rep. 205; *Re Terrell*, *Ib.* 213; and an agreement of manufacturers and sellers of vinegar to form a corporation, giv-

ing each manufacturer a right to subscribe to stock proportionately to his product, the remaining stock to be open for general purchase, the corporation to buy the entire product of each manufacturer, each to stipulate not to increase his product or to make more than the corporation calls for, and to sell as the agent of the corporation, at a price to be fixed by it, has been held valid: *United States Vinegar Co. v. Schlegel*, 67 Hun, 356; and even a monopoly of the ownership of sugar refineries in a single state, having no reference to and bearing no relation to interstate or foreign commerce, is held not a monopoly of interstate commerce: *United States v. E. C. Knight Co.*, 60 Fed. Rep. 306; *aff'd*, 934.

On the other hand, it has been held that where the contract or combination contains terms restraining production it will be void as a violation of public policy: *Santa Clara Valley Mill, etc., Co. v. Hayes*, 76 Cal. 387; *Western Wooden Ware Asso., etc., v. Starkey*, 84 Mich. 76; *Oliver v. Gilmore*, 52 Fed. Rep. 562; so where the combination is for the purpose, not of checking a ruinous competition between the parties thereto but of raising the price of an article of common demand by restricting the amount obtainable by the public or otherwise putting upon it an artificial or factitious price: *Urmston v. Whitelegg* (Q. B. D.) 8 R. R. & Corp. L. J. 153; *Texas Standard Cotton Oil Co. v. Adoue* (Tex.), 19 S. W. 274; *More v. Bennett* (Ill.), 29 N. E. 888; *People v. North River Sugar Ref. Co.*, 121 N. Y. 582; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.*, 14 N. Y. Supp. 277; this is especially the case where the article which is the subject of the combination is a popular necessity: *Samuel v. Oliver*, 130 Ill. 73; *Pacific Factor Co. v. Adler*, 90 Cal. 110; *Keene v. Kent*, 43 Hun, 640; *Cummings v. Foss*, 40 Ill. App. 523; or a necessity in a certain trade: *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224; and the illegal attempt is not validated because it takes the shape of forming a corporation: *Richardson v. Buhl*, 77 Mich. 632; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; *Vulcan Powder Co. v. California Vigorit Powder Co.* (Cal.), 31 Pac. 583.

An agreement by all the grocers in a town to give up dealing in butter, if a new firm shall establish a butter store in the place and pay as much as dealers in neighboring towns is void: *Chap-*

lin v. Brown (Iowa), 48 N. W. 1074; so where all the brewers of a large city and a neighboring town form a combination, which is given power to fix a minimum price at which beer shall be sold, and agree that they will not sell to any new trade, or to customers of each other, at less than said price: *Nester v. Continental Brewing Co.*, 161 Pa. 473; so an agreement of butchers and brokers of sheep and lambs, by which the former agree to sell only to the latter and the latter to sell only to the former: *Judd v. Harington*, 139 N. Y. 105 (this case seems to overrule *Live Stock Ass'n v. Levy*, 54 N. Y., *supra*, 32); and see *Fabacher v. Bryant*, 46 La. Ann. 820.

Restraint of trade—Covenant—Breach—Agreement by vendor of business not to “carry on or be in anywise interested in” any similar business—Good-will—Business carried on by vendor’s wife trading separately—Separate estate—Injunction.

SMITH *v.* HANCOCK.

(High Court of Justice—Court of Appeals, March 19, April 19, 23, 1894.)

[Reported L. R. [1894] 2 Ch. 377.]

The defendant, who had been carrying on the business of a grocer under the style of “T. P. Hancock,” sold the business to the plaintiff, and entered into an agreement not to “carry on or be in anywise interested in” any similar business within a specified area. About seven years later the wife of the defendant, desiring (against his wishes) to start her nephew in business, opened a grocer’s shop within the specified area, and carried on business there under the style of “Mrs. T. P. Hancock.” The business was managed by the nephew, and the defendant’s wife took some part in carrying it on; but the defendant took no part. The money necessary for starting the business was found by the wife out of her separate estate, and no money whatever was contributed by the defendant, either towards starting the business or carrying it on, nor did he share in the profits in any way. He, however, introduced his wife to his bankers, where she opened an account in her own name, assisted her in obtaining the lease of the shop in her own name, introduced the nephew to the wholesale merchants who had supplied the old business, and, as his wife was disabled by rheumatism from writing, wrote for her a cir-

cular inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own.

Held by the Court of Appeal (LINDLEY, KAY and A. L. SMITH, L. JJ.), KAY, L. J., dissenting, that there had been no breach of the agreement by the defendant.

Appeal from KEKEWICH, J., dismissed, but without costs.

Appeal from Mr. Justice KEKEWICH: [1894] 1 Ch. 209.

The defendant, Thomas Prosperous Hancock, for many years carried on business as a grocer, provision dealer and baker at Kids Grove, in the county of Stafford, a town of between three and four thousand inhabitants. He had two shops, one in Heathcote street, and the other in Market street. The name over the shop in Heathcote street was "T. P. Hancock." His wife, Agnes, assisted him in the business, and also a lad named John Kerr, who was a nephew of the wife. The defendant had no children.

In 1886, wishing to retire from business, the defendant sold the shop in Heathcote street, with some adjoining land, and "the good-will of the business connected with the said premises," to the plaintiff for £2,000; and by a written agreement, dated the 31st of March, 1886, the defendant, the vendor, undertook "not to carry on or be in anywise interested in the business of a wholesale or retail grocer and provision dealer and baker, or any of them, within a distance of five miles from the said premises, measured by the nearest cart-road, during the period of ten years, to be computed from the 11th day of November next," until which day the vendor was to be at liberty to carry on the business.

After the execution of this agreement the defendant sold his other shop and gave up business altogether, being a man of independent means. At the end of 1891 or the beginning of 1892, his wife, being desirous of helping her nephew, Kerr, asked the defendant to assist her in setting up a grocer's business in Kids Grove. To this, it appeared, he at first objected but ultimately he repaid to his wife a sum of £110 she had given him to invest, being savings which

he had permitted her to make out of the weekly housekeeping moneys he had allowed her, and with this money and £90 which she had in cash, she, in March, 1893, took and stocked a small shop in Market street, within two hundred yards from the shop in Heathcote street which the defendant had sold to the plaintiff, and painted up over it "Mrs. T. P. Hancock." There her nephew, Kerr, with her assistance, carried on the business of a grocer, provision dealer and baker. The defendant and his wife lived together at another house, Kerr residing with them. The business was conducted chiefly by Kerr, who received all moneys in connection with the business, he paying or accounting for them to Mrs. Hancock. For his services he received a small weekly sum and also a small share of the profits—which at present were trifling—after deducting 10s. a week for his board. Mrs. Hancock took some part in the business, going to the shop generally two days a week. All goods were ordered and paid for in her name by cheques drawn by Kerr on her banking account, which she opened and kept in the name of Agnes Hancock, the cheques being signed "Agnes Hancock, p. p. John Kerr." The lease of the shop was also in her name.

As Mrs. Hancock was not able at the time to write by reason of rheumatism in her right hand, the defendant himself wrote out a circular which was to be issued when the new business was opened. Copies of this circular were printed for distribution, and it was (so far as is material) thus worded :

"New Grocery and Provision Establishment,
Market Street, Kidsgrove.

Mrs. T. P. HANCOCK
has opened the above shop
with a new and well-selected stock of
Groceries and Provisions
and will be pleased to see all Old and New Friends.

Mrs. T. P. H. intends selling at prices that cannot be beaten in or out of the Potteries."

Then followed a list of teas, including—

"Mrs. Hancock's well-known Mixture, 2/- lb., 6d. qr."

Then, after some further announcements, the circular concluded thus:

"Note the Address—

"Mrs. T. P. HANCOCK, Market Street, Kidsgrove.
(Opposite Dickinson's, Draper)."

The tea referred to in the circular as "Mrs. Hancock's Mixture" was a tea formerly sold at the defendant's shop under that name.

The defendant distributed copies of the circular among a few of his old friends and customers, including a tenant of his, and he himself took Kerr to Liverpool and Manchester and introduced him there to four wholesale dealers who had supplied him, the defendant, in his former business, and he induced them to supply the new business in the same way. He also negotiated the lease of the new shop to Mrs. Hancock, the lease being taken in her name, introduced her and Kerr to the solicitors who drew the lease, and also introduced her to his bankers, with whom she then opened an account in her own name, and into this account the receipts of the business were paid. He did not otherwise concern himself in any way in the business, nor render any services in, or contribute any money to, the management of it.

On the 8th of May, 1893, the plaintiff brought this action for an injunction and damages, on the ground that the defendant had, in substance, committed a breach of the agreement of the 31st of March, 1886.

At the trial, Mr. Justice KEKEWICH held ([1894] 1 Ch. 209), that the defendant had not committed a breach of the agreement, and dismissed the action, with costs.

The plaintiff appealed.

The appeal was heard on the 19th of March and the 9th of April.

Warmington, Q. C., and A. D. Tyssen, for the plaintiff, appellant.—Mrs. Hancock is carrying on this business herself with money which is her separate estate. She should therefore carry it on only in her own name, "Agnes Hancock," and not, as she is doing, under her husband's initials, "T. P. Hancock," thus getting part of the good-will of the old business. As to the meaning of the covenant, it is obvious that a husband living with his wife is "interested in" a business carried on by her; but the evidence is sufficient to show that the defendant has in fact "interested" himself in the new business, by taking an active part in promoting it, as in *Newling v. Dobell*, 38 L. J. (Ch.) 111; and thus he has brought himself within the covenant. "Interested in" is not necessarily confined to receiving money out of the business either in the shape of profits or salary; it means that the defendant is not to assist in carrying on the business in any way whatever. In preparing and helping to distribute the circular soliciting the old customers, the defendant was clearly assisting in carrying on the business, and so "interesting" himself in it. Again, "carrying on" is not confined to carrying on by himself as principal. The letter and spirit of a covenant of this kind must be regarded. Here is the case of a person assisting another to obtain the benefit of a good-will which the former has himself sold. Apart from the relation of husband and wife, supposing the defendant had acted in the same way on behalf of a stranger, could there be any doubt that he would be held to have been "interested in" the business carried on by that stranger? "Interested in" includes "busying himself about" or "having something to do with" another business. The words "in anywise interested in" are meant to cover every possible kind of competition. As to the authorities bearing on the subject, if *Clarke v. Watkins*, 11 W. R.

319, which was decided in 1863, had come before the Court of Appeal at the present day, the result would have been different. In *Jones v. Heavens*, 4 Ch. D. 636, and *Baxter v. Lewis*, 30 Sol. J. 705, 754, injunctions were granted, though no doubt the words of the covenants differed from those in the present case.

Renshaw, Q. C., and *Brinton*, for the defendant, respondent. —The result of the authorities is, that a covenant of this kind must be construed strictly, and in favor of the covenantor. The present covenant is not in the ordinary stringent form, for it does not contain the words "concerned or engaged in." This new business is being carried on by Mrs. Hancock separately from her husband, partly with her earnings, which are, by the Married Women's Property Act, 1870, her separate property, and partly with money given to her by her husband, and which is also her separate property: *Ex parte Whitehead*, 14 Q. B. D. 419. Since that Act it is clear that a married woman may carry on business separately from her husband; and she cannot be stopped from doing so merely because her husband may have covenanted for himself not to carry on such a business. "Carrying on" a business means carrying it on as owner: *Allen v. Taylor*, 19 W. R. 35—a case which illustrates the rule that the court will not extend the operation of a covenant of this kind beyond the actual words used.

Then as to "interested in." A man cannot be said to be "interested in" a business unless he derives some benefit from it. In *Bird v. Lake*, 1 H. & M. 111, 338, 340, it was held that a covenant not to "carry on or be engaged in" a particular business did not prohibit the covenantor from lending money to a person engaged in such a business, although he knew there was no means of repaying the money except out of the profits of the business.

[KAY, L. J.—The object of this covenant is to prevent the person who bought the business from being interfered

with. I do not remember this device ever having been adopted before.

LINDLEY, L. J.—Though the defendant does not carry on the business himself, he lets his wife do so, and does not stop her.]

Upon the evidence, there is no sham or fraudulent design on the part of the defendant, and therefore we are entitled to rely upon the express words of the covenant. "Carry on" means as owner, and "interested in" means as co-owner, or as a person receiving a salary out of the profits, or receiving such a share of the profits as is sufficient to confer upon him an interest in the business; it does not mean "interesting himself in." "In anywise" means "in any way"—that is to say, the covenantor must have some interest which confers a benefit. The test is, Is there any legal obligation on the wife's part to pay any of the profits of the business to the husband? There is clearly none; the profits being earned by the wife out of her separate estate. As to the circular, it is now settled that the vendor of the good-will of a business, in the absence of express stipulation to the contrary, may not only carry on a similar business but solicit customers of his former business, provided he does not represent himself as carrying on the old business, or as being the successor of the person by whom it was carried on: *Pearson v. Pearson*, 27 Ch. D. 145, overruling *Labouchere v. Dawson*, Law. Rep. 13 Eq. 322.

Warmington, in reply.—Mrs. Hancock's marriage did not confer upon her any legal right to use her husband's Christian names, and her husband could have prevented her from so doing. From her use of his initials, "T. P.," the public would conclude she was carrying on the old business. As to the form of the covenant, it must be so construed as to effect what the parties had in view, namely, to protect the good-will which was being sold. The husband could not have taken more serious steps towards establishing the new business than

he did by introducing his wife to his bankers, assisting her in obtaining the lease, introducing Kerr to the wholesale dealers who supplied the old business, negotiating the lease, and drawing up and distributing the circular soliciting the old customers.

The case is covered by the words "in anywise." A husband living with a wife who is engaged in business is "interested in" the business—that is, in its success. He is therefore interested in it in "somewise."

LINDLEY, L. J., April 23, 1894.—This is an appeal from an order of Mr. Justice KEKEWICH, refusing an injunction to restrain the defendant from breaking an agreement, into which he entered with the plaintiff on the occasion of the sale to him of a business formerly carried on by the defendant. The defendant formerly carried on business as a grocer, provision dealer and baker under the name of T. P. Hancock, in Kidsgrove, Staffordshire. His wife Agnes assisted him in his business, as did also a nephew of hers named John Kerr. In March, 1886, the defendant sold this business to the plaintiff, and agreed "not to carry on or be in anywise interested in the business of a wholesale or retail grocer and provision dealer and baker, or any of them," within a distance of five miles from the old shop, for a period of ten years. This agreement, it will be observed, is personal to the defendant; it binds him and him only; it does not extend to any one else, or make him answerable for the conduct of any one but himself. In the next place, his obligation is confined to abstaining from two lines of conduct, viz.: (1) carrying on any of the businesses specified, and (2) being in anywise interested in any of such businesses.

The agreement, like every other agreement, must be construed with reference to the subject-matter to which it relates, and so as to give effect to, and not to defeat, the object to attain which the agreement was entered into. This

object is plain enough: it was to secure the plaintiff from the competition of the defendant. But, although this is the object, it is not in accordance with sound legal principle to give to the language of the agreement a wider interpretation than that language properly bears. The duty of the court is confined to enforcing the agreement entered into, and it is not permissible to extend it so as to make the defendant responsible either for the conduct of other people besides himself or for conduct which does not amount to carrying on or being in any way interested in one of the prohibited businesses. These principles are elementary, and their application to such cases as the present is well exemplified by the case of *Bird v. Lake*, 1 H. & M. 111, 338.

I pass on to consider what the defendant has done, and what others have done, for which it is sought to make him responsible. The defendant himself *bona fide* retired from business, and he has not himself made any attempt whatever to carry on business, nor does he carry on any business himself, nor has he attempted to acquire, nor has he in fact any interest whatever in, any business. The learned judge who saw the witnesses came to this conclusion, and I not only see no reason to differ from him, but I am satisfied that the evidence warrants the conclusion arrived at. What has been done is this: Some six or seven years after the sale of the business the defendant's wife set to work to start her nephew, John Kerr, in business. She had some £200 of her own. The evidence on this point satisfied the learned judge that she had separate estate to this amount, and again I agree in his conclusion. She took a grocer's shop near the plaintiff's. She painted up "Mrs. T. P. Hancock," and her nephew Kerr has carried on business there since with her help and under her name. She lives with her husband (the defendant) at another house, but she goes every now and then to the shop, and is generally there two days a week. The defendant certainly assisted her and Kerr to start this shop, although at

first he objected to the scheme. But he helped his wife to get a lease of the shop; he introduced her to a local bank, where she opened an account in her own name; and he introduced Kerr to wholesale suppliers of grocery and other goods, and so induced them to give him credit. The defendant further assisted in the preparation of a circular, inviting old friends and customers to deal at the shop; and "Mrs. Hancock's mixture," which was some tea which he used when he was in business, was prominently referred to in the circular. Further, he gave this circular to two or three old friends and customers. The defendant, however, has no pecuniary interest in the business; he is not liable for the debts contracted by his wife or by Kerr in carrying on the business; and the profits, if any, cannot be claimed by the defendant. All moneys received and paid in respect of the business pass through his wife's account at the bank, and on this account the defendant has no power to draw. The wife pays Kerr a salary, and, as I gather, a share of the profits.

Now, it cannot be denied that this proceeding is calculated to injure the plaintiff, and no one can be surprised at his being greatly annoyed by it. If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly. But I find it impossible to avoid the conclusion that the business is being carried on by the wife primarily for Kerr, and, perhaps, to some extent, for herself; but, there being at present little or no profit, she has not yet got any money out of the business for herself.

This being the state of the case I am unable to hold that the defendant has done, or is doing, or is threatening or intending to do, what he agreed not to do. The utmost that can be said is that he has assisted his wife and Kerr to do

what he agreed not to do himself. No honorable man would have done that, and no honorable man would, if he could help it, allow his wife to do what she has done and is doing. But, as a matter of law, I cannot say that the defendant is breaking his agreement. In *Bird v. Lake*, 1 H. & M. 111, 338, it was held that to help a man carry on business by lending him money without security was not a breach of a covenant "not to carry on or be engaged in the business or any matter or thing whatsoever in anywise relating thereto." So here, to help Kerr to carry on business by introducing him to persons who would furnish him with goods on credit, and by further assisting him through Mrs. Hancock, cannot, without straining the words of the defendant's agreement, be held to be a breach of that agreement. A married woman with separate estate has a right to carry on business in her own name—*i. e.*, in the name of her husband, with the prefix "Mrs.," and I am not aware that he can prevent her from so doing by any legal proceedings. Even if he can, he is under no legal obligation to do so, unless he has imposed such obligation on himself by some contract. An agreement by a husband not to do a thing does not oblige him to prevent his wife from doing that same thing if she has a right to do it independently of him. Whether the defendant in this case could or could not prevent his wife from assisting her nephew, Kerr, I do not know. The defendant does not say that he has endeavored to do so and has failed. But, supposing he could do so, he has not agreed to do so, nor to try to do so, and the court cannot itself impose any such obligation upon him.

It is urged that, even if the defendant is not carrying on the business, he is in some way "interested" in it, that he is interesting himself in it, and that he can be restrained, and ought to be restrained, from so doing. As the defendant and his wife are living together I have no doubt that he is interested in her, and perhaps also in her nephew, Kerr.

Further, if the wife gets any profit out of the business she may very likely make use of it in adding to her husband's comforts. But I cannot say that he is in any way "interested" in the business which she has started and is carrying on for Kerr. What interest has he in that business? Certainly no pecuniary interest. His only interest is that indirect interest which every man has in the happiness and welfare of his wife. But to have such an interest as this is no breach of the defendant's agreement. When a person sells a business and agrees not to carry on, or be in any way interested in any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it. An injunction to restrain the defendant from carrying on, or being in any way interested in the business, would not be broken if the defendant were to repeat what he has done for Kerr, and is doing, by living with his wife without trying to stop what she is doing. I have reluctantly come to the conclusion that the plaintiff is not entitled to an injunction in this case, and his appeal must be dismissed, but, under the circumstances, not with costs.

This case is one of general importance. Conveyancers will have to exercise their ingenuity in devising some method of stopping a wife with separate estate from carrying on a business in rivalry with a purchaser of a similar business from her husband. The agreement entered into in this case, to which the wife is not a party, does not cover such conduct, nor do the common forms at present in use. The old doctrine that the husband and wife are one person is inapplicable; they are not one with reference to her separate estate; his obligations are not hers, nor are hers his.

KAY, L. J. (after reading the agreement entered into by the defendant, continued):

The object of this agreement was obviously to secure to

the purchaser the good-will free from interference by the vendor. For this purpose the vendor agreed not to carry on or be in anywise interested in a similar business. If he did, he would attract some of the old customers, and draw them away from the purchaser. It seems to me clear that it is not confined to a pecuniary interest. If he carried on, or was in anywise interested in, a like business which drew away the old customers from the purchaser or otherwise diminished his receipts, though he took no pecuniary benefit from that business, the injury to the purchaser would be the same. Then "carry on" does not mean "exclusively" carry on, or even "principally." If he became partner with other persons, even a dormant partner, or if he contributed capital to aid a like business, or became manager, I should think he would have broken this agreement. So any active assistance in the business, particularly any such as was intended and calculated to attract his former customers and to take them away from the purchaser, would, in my opinion, be a "carrying on" within the meaning of those words as used in this agreement. I am also of opinion that being "interested in" means something short of "carrying on," and, when coupled with the words "in anywise," a very large meaning should be given to those words in furtherance of what seems to me the obvious intention.

The defendant for some years observed this agreement. He sold his other shop, and gave up business altogether. [His Lordship then stated the circumstances under which Mrs. Hancock set up the business complained of, expressing his concurrence with the finding of Mr. Justice KEKEWICH that the business was her separate business, and that the money employed in it was her separate property. Then, after observing that the defendant had drawn up the circular with his own hands, had himself distributed copies of it, had introduced Kerr to wholesale dealers, had negotiated the lease of the new shop, introducing his wife and Kerr to

the solicitors who prepared it, and had also introduced his wife to the bank, his Lordship continued :]

Suppose that the defendant should in future repeat these and similar acts, could it be said that he was not "carrying on" or was not "in anywise interested in" this business? In my opinion it could not. I think that what he has done has been a breach of the agreement in both its branches. He has been assisting in carrying on this business, and it seems to me impossible to say that he is not "in anywise interested in" it. It is not necessary, but I do not think it would be improper, to construe the words "in anywise interested" as meaning, shall not in anywise actively interest himself in the business so as to interfere with the good-will which he had sold.

What the defendant has done seems to me to be a deliberate attempt to defraud the plaintiff by getting back some of the good-will which the defendant sold to him. It is a principle of English law that a vendor shall not, after the sale, derogate from his own grant. For example, if a man sells a house with windows in it looking over his adjoining land he cannot afterwards build upon that adjoining land so as to obscure such windows. *Palmer v. Fletcher*, 1 Lev. 122, which is one of the leading authorities on that law, was decided in the King's Bench in 1662, two hundred and thirty years ago. It was formally approved by Lord Holt in *Tenant v. Goldwin*, 2 Ld. Raym. 1093, and is constantly cited at this day as undoubted law. If the man sells the good-will of a business I have never been able to understand why the same principle should not apply. It is an anomaly by no means creditable to the law that there is an exception to the rule in that case, and it is therefore necessary to obtain an express contract from the vendor not to carry on a like trade. But, when there is such a contract, I am inclined to construe it, as much as can fairly be done, in favor of the inten-

tion, to prevent any derogation from the value of the thing sold. I think that an injunction ought to be granted against the defendant in the words of the agreement which I have read, to restrain him, his servants and agents from carrying on or being in anywise interested in the business set up in the name of his wife, or any similar business during the ten years mentioned in the agreement, within five miles from the premises in Heathcote street, and that the defendant should be ordered to pay the costs here and below.

A. L. SMITH, L. J. (after stating facts, continued).—That the object of the wife in opening the business for the nephew at the place in question was to obtain as much as she could of the good-will of the old business for which her husband had received the £2,000 is to me apparent. The circular which was issued, and the placing up of “Mrs. T. P. Hancock” upon the *fascia* of the shop, coupled with the other circumstances of the case, make this obvious; and that her conduct is reprehensible is beyond dispute, as also that of her husband, for reasons I will hereafter state.

It is true that this case may be opened in such a way as to lead to the inference that the whole thing was a sham concocted by the husband and wife in order to evade his covenant; and indeed Mr. Warmington so opened this appeal; but, having heard Mr. Renshaw and Mr. Brinton on the defendant's behalf, and having re-read the evidence since the argument was closed, I have arrived at the conclusion that Mr. Justice KEKEWICH was right in the decision at which he arrived, when he held that the business was really that of the wife and not that of the husband, and that there was no attempted deception in the matter.

Before the passing of the Married Women's Property Acts of 1870 and 1882 I do not doubt that a wife, setting up business in the way Mrs. Hancock has, would have done so as agent for her husband; for as long as coverture ex-

isted she could do so in no other capacity, and her acts would then constitute a breach of covenant by the husband, on the principle *qui facit per alium facit per se*. But this is not so now. The wife, although coverture exists, can nevertheless trade with her own separate property, apart from her husband and free from his control, as if she were a *feme sole*, as and when she pleases ; and, if she does so, she is no more the agent for her husband than his father, uncle or brother would be under like circumstances, nor can the husband restrain his wife from so acting. It is true that the proposition sounds novel, but, when looked into, the above is the real position of a wife in relation to her husband at the present time in the circumstances of this case. If, therefore, it is desired to restrain such an act of a wife, the covenant of the husband must hereafter be so framed as to meet the case ; for it is no part of the duty of the court to place a forced construction upon the covenant, which it will not fairly bear, in order to put a stop to that of which it disapproves.

When the agreement in this case was framed, the capacity of the wife to do what she has done was not contemplated by the parties, for, if so, the covenant would obviously have been different. Mr. Warmington, in an excellent argument, contended that the guiding rule was that we should construe a covenant like the present so as to carry out the objects and intention of the parties ; and in this I agree, if he had limited his proposition, which he did not, by the words "so far as the language of the covenant will fairly allow, and no further." Now, the covenant is that the covenantor will not carry on, nor in any way be interested in, a business of a character similar to that sold, within the prescribed limits of time and space ; which, in my judgment, means that he will not carry on, by himself or his agent, such a business, nor will he in anywise have any interest, be it pecuniary or personal, in such a business. It is not a covenant that he will not take an interest,

whether from feelings of affection or friendship or what not, in how another may carry on his or her business within the prescribed limits. The words are, "or be in anywise interested in" the businesses. To constitute a breach of the covenant it must be proved that the covenantor has some interest in the business itself which is being carried on, and not that he only takes, or has taken, an interest in the success of another carrying on his or her business. In my opinion, this is the true reading of the covenant.

If this case had rested here for the reasons above stated, I should hold that the fact that the defendant's wife was carrying on a business as a *feme sole*, with her separate property on her own behalf, within the prescribed limits, did not establish a breach of covenant by the defendant. The husband takes no part whatever in the management of the business, and has advanced no money in that behalf. But it was said, and with truth—and this is an important part of the case—that the defendant, before the business was started, did not attempt to restrain his wife from carrying it on, but actually aided and abetted her in so doing, by introducing her to his bankers, by going with her nephew to the old wholesale dealers with the old firm in Manchester, and introducing him to them, and by taking part in the penning of the circular, which, it appears, was issued after the business was started, and in taking part in the issuing of it. I agree that this is evidence which might well lead to the inference that the business was in reality his, and not his wife's, or partly his and partly hers, which would suffice to constitute a breach of covenant by the husband, for he would then have an interest in the business. But, when this inference is disproved, as, in my judgment, it is in this case, how do the acts of the husband constitute a breach of the agreement sued on? He has no interest whatever in the business itself, which is that of his wife, carried on by her for her own purposes, though he has taken an interest in her succeeding therein, which these acts of his show that

he has done. If the husband had performed similar acts in like circumstances for a stranger who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger; and so now the same result follows if he does the same acts for his wife. I agree that his conduct is such as to be highly disapproved of; but that does not constitute a breach of the agreement sued on. This agreement of the 31st of March, 1886, does not cover the present case, and I cannot, though I should like to do so, hold that the husband has broken his agreement.

I agree with Mr. Justice KEKEWICH, and, consequently, I think that this appeal must be dismissed.

A case very much like the principal case, except that there does not seem to be any express finding that the husband had no interest in the new business, is *Thompson v. Andrus*, 73 Mich. 551, where defendant, who had a hardware store, in which his son was employed as manager and his daughter as book-keeper, sold the business and good-will to the plaintiff, and agreed not to engage in the hardware business in the same town for ten years; the son also agreed not to engage in such business as a principal; shortly after the sale, a new hardware store was opened in the same town in the name of the wife, the son and daughter filling positions similar to those they had held with their father. The money used by the wife in stocking the new business came from the amount received by the husband for the purchase of the old business. The wife claimed that her husband was indebted to her in the sum used by her, and that its receipt from the purchase-money merely discharged a debt. The court enjoined defendant, his son and his wife from carrying on business in the town for the time agreed upon.

With regard to the principal case, one cannot help feeling that the very object of the contract between the plaintiff and defendant has been utterly destroyed by the entry into business of the wife, with the connivance (for since the recent *Married Women's*

Property Act and similar legislation "permission" may be perhaps an impertinence) of her husband, the defendant, and yet the defendant has not violated his contract if he did not carry on or become interested pecuniarily in his wife's business. That was the extent of his contract, and there is no presumption under the English Act that the wife was the husband's agent. In *Breck v. Ringler*, 129 N. Y. 656, it was held that an agreement by the seller of the stock and good-will of a plant for making fine etchings, that he would not carry on the same line of business in any manner whatever, was not violated by the vendor subsequently engaging in the business of electrotyping and stereotyping, and occasionally procuring a zinc etching plate for himself or a friend or a customer from makers other than the purchaser.

By the mere sale of the good-will without more the vendor does not transfer the right to use his name: *Re Randell's Est.*, 8 N. Y. Supp. 652; *Morgan v. Schuyler*, 79 N. Y. 490; but where with the good-will the vendor sold his stock in trade, including cards bearing his name, it was held that the purchaser was entitled to use the name after the cards were exhausted, provided he did not so exercise this right as to expose the vendor to liability: *Thynne v. Shove*, L. R. 45 Ch. D. 577; and see *Chattens v. Isaacson*, 57 L. T. N. S. 177, and when the name is a trade-mark the right to use it will pass to the vendee of good-will, either in terms or as included in the assets of a business: *Fish Bros. Wagon Co. v. Fish*, 82 Wisc. 546, and see *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215. The vendor of the good-will may engage in business in the same line in the same village or city: *Cottrell v. Babcock, etc., Co.*, 54 Conn. 22; *Bergamini v. Bastian*, 35 La. Ann. 60; *Hanna v. Andrews*, 50 Iowa, 462; *Bassett v. Percival*, 5 Allen, 345; *Cruttwell v. Lye*, 17 Ves. 344; *Davies v. Hodgson*, 25 Beav. 177; *Churton v. Douglass*, 1 Johns. Ch. (Eng.) 176; *Howe v. Searing*, 6 Bosw. 354; *Dayton v. Wilkes*, 17 How. Pr. 510; *White v. Jones*, 1 Abb. Pr. (N. S.) 377; *Cook v. Callingridge*, Jac. 607; *Washburne v. Dorsch*, 68 Wisc. 436; *Costello v. Eddy*, 58 Hun, 605; *Close v. Flesher*, 29 N. Y. S. R. 283; he may use his own name in the new business, provided he do not so use it as to lead to the inference that the business being carried on is the old business:

Knoedler v. Glazener, 55 Fed. Rep. 895; Vonderbank v. Schmidt, 44 La. Ann. 264; if he announce that it is the old business or the successor thereto he may be enjoined: Hall's Appeal, 60 Pa. 458.

It was at one time held that the seller of a business with its good-will must not personally solicit (under which terms was included solicitation by postal, letter or by traveling salesman) any of the old customers to deal with him. See Labouchere v. Dawson, L. R. 13 Eq. 322; Ginesi v. Cooper, 14 Ch. D. 596; Leggott v. Barrett, 15 Ib. 306. These cases are in effect (Labouchere v. Dawson expressly) overruled by Pearson v. Pearson, 27 Ch. D. 145, and the rule may now be said to be that the vendor of good-will, who has established a new business of a similar kind or who trades in the same kind of goods, may solicit old customers to deal with him: Pearson v. Pearson, *supra*; Bergamini v. Bastian, *supra*; Marcus Ward & Co. v. Ward, 40 N. Y. S. R. 792.

Business — Good-will — Trade name — Assignment in gross — Infringement — Injunction.

THORNELOE v. HILL.

(High Court of Justice, Chancery Division, Jan. 12, 13, 15, 16, 22, 1894.)

[1892, T. 2171.]

[Reported L. R. [1894] 1 Ch. 569.]

John Forrest, a watchmaker in London, used to mark the words "John Forrest, London," on the goods made by him. After his death, in 1871, his administratrix sold his business and good-will to C. & Co., watchmakers in London. In 1874, C. & Co. granted to S. & Co., watchmakers in Liverpool, the sole right for seven years to put the words "John Forrest, London," on the watches they made. After the expiration of the license C. & Co. inscribed "John Forrest, London," on very few, if any, of their watches. In 1890, they assigned all their estate for the benefit of creditors, and their trustees sold their business to X., who carried it on; and at the same time the trustee purported to assign to T., a watchmaker at Coventry, "the name, title and good-will of John Forrest, London." In an

action by T. to restrain a rival watchmaker in Coventry from selling watches inscribed "John Forrest, London:"

Held, that the action could not be maintained, for that, assuming C. & Co. acquired in 1871 the right to inscribe "John Forrest, London," on their watches, they lost that right under the license to S. & Co., and never regained it;

Held, also, that even if anything was assigned to T. by the trustee of C. & Co., it was merely the right to use the name "John Forrest, London," unconnected with any business, and, being a mere assignment in gross, was invalid.

For many years prior to the year 1871 John Forrest carried on business as a chronometer and watchmaker in London. He was in the habit of inscribing on his watches "John Forrest, Chronometer maker to the Admiralty, London, E. C.," and established a reputation for the excellence of his goods. He was not, however, chronometer maker to the admiralty.

On the 15th of February, 1871, John Forrest died intestate, and by deed dated the 12th of June, 1871, Georgina Leitch, his administratrix, sold and assigned to Carley & Co., a firm of watch and chronometer makers in London, "all that the trade and good-will and other the interest of the said Georgina Leitch, as such administratrix as aforesaid, in the business of a watchmaker carried on by the said John Forrest, deceased, and all the benefit and advantage thereof, with the right to do all such acts and things as she the said administratrix could have done in carrying on the said business." After this assignment Carley & Co. continued to carry on their business of watch and chronometer makers, but not under the name nor on the premises of John Forrest. They, however, put the name and description of "John Forrest, Chronometer maker to the Admiralty, London," on some of the goods they made and sold.

By deed dated the 7th of February, 1874, Carley & Co. granted to H. Stuart & Co., Limited, carrying on the business of watchmakers at Liverpool, the sole right to make watches with the name "John Forrest" thereon for the term

of seven years from that date. After the expiration of this license Carley & Co. put the name of John Forrest on very few, if any, of the watches made by them.

By deed dated the 14th of August, 1890, Carley & Co. assigned to one George Read the whole of their estate and effects upon trust for the benefit of their creditors; and on the 28th of February, 1891, George Read, as such trustee, assigned for value to one Clemence the business of Carley & Co., and the good-will thereof, and he continued to carry it on. The same day George Read, as such trustee, in consideration of £20, assigned to the plaintiff the name, title and good-will of the business of John Forrest, trading under the style or title of "John Forrest, Chronometer maker to the Admiralty, London, E. C." Under this assignment the plaintiff, who was a watch and chronometer maker at Coventry, claimed the exclusive right to make and sell watches with the name "John Forrest" inscribed thereon, and now claimed an injunction to restrain the defendant, who was also a watchmaker at Coventry, and was making and selling watches with the name "John Forrest" inscribed thereon, from so doing, and from in any manner representing or doing anything calculated to lead the public to believe that the defendant was carrying on the business of John Forrest or of the plaintiff.

The defendant, by his statement of defense, denied that John Forrest was chronometer maker to the admiralty, and alleged that if he traded under that name and description, such trading was a fraud, and that if Carley & Co. traded under such name and description, such trading was fraudulent. The defendant also contended that if Carley & Co. ever had any right to carry on business as "John Forrest," such rights were determined by the license granted to H. Stuart & Co., Limited, and were never again acquired and did not pass, and could not pass, to G. Read; and that as the business of Carley & Co. was still being carried on, G. Read could not deal with the good-will in part, but that the

whole of the good-will went with the business. Issue was joined, and this was the trial of the action.

It appeared from the evidence that a trade-mark with the name "John Forrest" which the defendant had registered had by an order of the court been expunged from the register: *In re Hill's Trade-mark*, 10 Rep. Pat. Cas. 113, 116. The other material facts are sufficiently noticed in the judgment.

Sir R. Webster, Q. C., and Sebastian, for the plaintiff.—Good-will is every advantage connected with the business and the name of the firm. It is "property," and assignable at law. A trade name may be part of the good-will, and may be subject of bargain and sale, and is not necessarily dependent on the business being carried on at a particular place. If John Forrest were alive he could say, "I will sell you my name and introduce you to my customers." That would be property and capable of assignment, even if there were only a small trade or a ruined trade. The suggestion that you cannot have good-will unless you are carrying on the business is erroneous. The right to put the name "John Forrest" on watches was a valuable asset in the hands of Carley & Co. They only parted with it for a limited period, and on the expiration of the license it re-vested in them, and it passed as part of their assets under their assignment to Read, and he could dispose of it: *Churton v. Douglas*, Joh. 174; *Potter v. Commissioners of Inland Revenue*, 10 Ex. 147; *Kelly v. Hutton*, Law Rep. 3 Ch. 703; *Llewellyn v. Rutherford*, Law Rep. 10 C. P. 456, 469; *Dent v. Turpin*, 2 J. & H. 139; *Ford v. Foster*, Law Rep. 7 Ch. 611; *Lindley on Partnership*, 5th Ed. Bk. III, Chap. ix, § 2.

Moulton, Q. C., and Willis Bund, for the defendant.—It is a fallacy to say that a man may buy the right to put a particular name on goods irrespective of any business. He must earn it—*i. e.*, make it truthful. Continuity in the

existence of a firm is the *ratio decidendi* in all the cases where a good-will and business have been assigned, and there is no distinction in principle between a trade name and a trade-mark when applied to particular goods. The court will not protect a representation that is not true. The good-will of a firm, so far as it is applicable to goods, is one and indivisible, and cannot be cut up into pieces, and where there is no business it cannot be assigned. It is fatal to the plaintiff's claim that the license was granted in 1874, assuming Carley & Co. could grant it, because the right granted to Stuart & Co., Limited, to put "John Forrest, London," on their watches was a false representation : *In re Wood's Trade-mark*, 32 Ch. D. 247, 263 ; and when Carley & Co. became bankrupt they had absolutely no right whatever to make any representation that they made "John Forrest" watches, and, therefore, they could not sell such a right. But even if something did pass under the assignment to the plaintiff, he could make no use of it because he does not carry on business in London. It is a false representation of origin within § 3 of the Merchandise Marks Act, 1887.

Sebastian, in reply.

ROMER, J., January 22, 1894.—The question involved in this action is as to the right claimed by the plaintiff to put the name of "John Forrest" on all the watches manufactured by him, and to restrain the defendant, and any one else not authorized by him, from putting that name on watches and selling them. Now, the circumstances under which he is said to have acquired that right are these : There was a man named John Forrest who carried on in his own name the business of a watch manufacturer in London. He used to put on the face of his watches the words "John Forrest, Chronometer maker to the Admiralty, London, E. C." As a matter of fact he was not chronometer maker to the admiralty ; but I will in this judgment

disregard the fact, as I intend to decide this case on broader grounds. In February, 1871, he died, and his administratrix sold his business and good-will to Carley & Co. Now Carley & Co. never carried on business under the name of "John Forrest," or at any house or in any street where John Forrest ever carried on business. Nor did they ever use that name in their business except in the following way: Until 1874 on some of their watches, and in particular until the 7th of February, 1874, on the watches they sold to one James Edey, of Peebles, they put the above-mentioned inscription that John Forrest used to put on his watches. On the 7th of February, 1874, by indenture of that date, Carley & Co. purported to grant to H. Stuart & Co., Limited, of Liverpool, for seven years from that date, the sole right of manufacturing watches with John Forrest's name inscribed thereon, and Carley & Co. agreed that during the license they would not manufacture or sell any watches as the watches of John Forrest, or with his name inscribed thereon. Accordingly, during those seven years H. Stuart & Co., Limited, in the course of and as part of their watch-making business, manufactured and sold watches with the same inscription thereon that I have before mentioned, and Carley & Co. ceased to put the name of John Forrest on any of their watches. After the expiration of the seven years and until they failed in 1890, Carley & Co. did not put on the watches they made and sold the name of John Forrest, except, it is said, on a few. As to those few there is only the evidence of Mr. Gent, one of the members of the firm, and the conclusion I come to on his evidence is that, even if his memory does not mislead him as to any watches being so marked, they were so few as to constitute a wholly unsubstantial sale. When Carley & Co. failed they assigned their assets to a trustee, Mr. Read, for the benefit of their creditors. On the 28th of February, 1891, Read assigned to a Mr. Clemence the business carried on by Carley & Co. at the date of the failure, and its good-

will and the lease of the premises on which Carley & Co. had carried on their business. Immediately afterwards, but on the same day, Read purported to assign, so far as he lawfully could, to the plaintiffs for £20, "the name, title and good-will of the business of John Forrest, trading under the style or title of John Forrest, Chronometer maker to the Admiralty, London, E. C." Assuming that this last assignment could be said to pass anything, having regard to the prior assignment to Mr. Clemence, it is clear to my mind that it could only pass or purport to pass the right to use the name of John Forrest as a thing in gross wholly unconnected with any real or substantial business. It is under this assignment that the plaintiff claims. No doubt the plaintiff, who was and is a watch manufacturer at Coventry, ventured this small sum of £20 for such right to the name of John Forrest as Read might possibly be able to assign, because he had some experience in the name of John Forrest. That experience was derived from the fact that prior to the failure of Carley & Co., and without any leave sought or given, he had made for four different customers of his watches on which, by their directions, he had himself put the words "John Forrest, London." The plaintiff never has carried on business in London, nor has he ever carried on business under the name of John Forrest, nor has he even since the so-called assignment to him ever used the name in his business except by placing it on some of his watches. Under these circumstances has the plaintiff the right contended for him? I think not, and for the following, among other reasons. Carley & Co. undoubtedly bought the good-will of John Forrest's business.

Now, speaking generally, a purchaser of a business if he continues it has the right to use the trade name and trade-marks of the business in any way he pleases which is not calculated to deceive. And in particular, as a rule, the purchaser of a business may mark goods made by him in the course of that business with the name of the vendor,

although the vendor or his old workmen did not make or assist in making such goods, and by so marking the goods the purchaser would not be considered as doing that which was calculated to deceive his customers or the public. The reason of that is that in most cases, and especially where the purchaser is continuing the business, the mark in the vendor's name might fairly be held to be only a representation that the goods were manufactured in the course of the business without any representation as to the persons by whom that business was being carried on, and there would be no substantial risk of deception. But in cases where deception would arise, or would probably arise, from the marking of the vendor's name or from the way in which it was marked, then the marking would be fraudulent, and the purchaser could not be heard to say after a course of such fraudulent marking that by having his goods so marked the mark had come to represent goods made by him as the vendor's successor in business. For instance, where the goods sold in a business are of an artistic character and during the vendor's time acquired their reputation and depended for their value upon his personal skill, then, if his retirement from the business were kept secret, a purchaser of his business would not be entitled to sell goods not made by the vendor marked by his name. But I will assume in the present case in favor of the plaintiff that until the 7th of February, 1874, the watches made by Carley & Co., and marked by them with John Forrest's name, were rightly so marked, and that up to that date they could honestly say that watches so marked represented goods made either by John Forrest or by his successors in business. I say I will assume this, as I wish to guard myself from the supposition that I so decide, having regard to the facts, and, in particular, to the fact that Carley & Co. marked their watches, not only with "John Forrest, London," but also with the description, "John Forrest, Chronometer maker to the Admiralty." I think that de-

scription was marked in order to set forth the personal qualification of the maker, and as a matter of importance, and in order to impress those into whose hands the watches should come with the idea that the watches were made by or under the supervision of one holding the responsible position of chronometer maker to the admiralty. And even if Carley & Co. could justify their marking of the name of "John Forrest" on the ground that it only meant themselves as the successors of John Forrest, I do not see how they could at the same time with propriety identify themselves with the description of chronometer makers to the admiralty when they were nothing of the kind. But passing this over, and on the assumption I have mentioned, how did matters stand on the expiration of the seven years' license? During those seven years H. Stuart & Co., Limited, were expressly authorized by Carley & Co. to manufacture and sell watches stamped with the name of "John Forrest, London." That company, who carried on business in their own name, were not John Forrest or successors in the business of John Forrest, and were carrying on business at Liverpool and not in London, and this to the knowledge of Carley & Co. How after that could Carley & Co. be heard to assert that the name of "John Forrest, London," on watches still represented and meant that the watches were made either by John Forrest or by his successors in business? To so assert would be to admit that they had authorized the Liverpool company to commit a fraud on the public. The deed of the 7th of February, 1874, did not assign, or purport to assign, any business, or any part of the business of Carley & Co., to the Liverpool company. It was a mere grant of a license to use the name of John Forrest, and I need scarcely say that, apart from other objections to the license purported to be granted, a trade name or mark cannot be validly assigned in gross. When the license expired Carley & Co., who had ceased during the seven years to use the name of John Forrest in any way whatever in their business, had, in my

opinion, lost any right they might before have had to say that any person marking watches "John Forrest" thereby represented that they were watches manufactured by them or in the course of their business. See *In re Wood's Trade-mark*, 32 Ch. D. 247, and particularly the observations of Lord Justice LINDLEY, 32 Ch. D. 260. This being the position of affairs at the end of the license, certainly Carley & Co. did not by the time of their failure regain any right, even if they could possibly have done so; for, as I have pointed out, there was in the meantime no substantial manufacture or sale by them of watches so marked. And if they at the date of their failure had no such right, they could not assign it to Read, nor could Read assign it to the plaintiff. And if Carley & Co. had no such right at the time of their failure, they could not then have obtained an injunction against the defendant for stamping watches with the name "John Forrest," nor could the plaintiff acquire through them the right to such an injunction, even if he had acquired all their business. For all that the defendant is doing that can be complained of by the plaintiff is marking his watches with John Forrest's name. That is, in my opinion, a very improper proceeding, because it is a fraud on the public; but it does not enable the plaintiff to support this action. To entitle the plaintiff to an injunction, he must have been able to establish (there being no question of trade-mark) that such marking by the defendant was calculated to deceive the public or customers into the belief that the goods so marked were goods made in the course of the business belonging to the plaintiff, and this he could not do for the reasons I have pointed out. But the matter does not stop there. Even assuming that Carley & Co., or Read, as their trustee, could, if no assignment had been made, have restrained the defendant, the plaintiff, who, in my opinion, can only claim to be a mere assignee in gross of the right to the name "John Forrest," cannot sue the defendant. The plaintiff is in no real or true sense an as-

signee of the business of Carley & Co., or of any severed or severable part of it. The wording of the so-called assignment to him is relied on by him, and in particular the use of the word "good-will." But the words used meant nothing more than that Read proposed to transfer, if and so far as he could, to the plaintiff the right to the mere name of John Forrest and such advantage, if any, as could be said to attach to such a right. As I have before pointed out, the right merely to use a name as a property in itself cannot be validly assigned so as to confer rights as against the public, nor can any advantage whatever as against the public attach to any attempted assignment of the sort. Lastly, I should point out that ever since the death of John Forrest, Carley & Co. and those claiming through them have never used the name of John Forrest except by stamping it on goods—that is to say, as a trade-mark. They could not insist that it was or is a trade-mark or claim rights on that ground for many reasons—one of which is that they have never registered or or applied to register it under the Trade-Marks Acts. And not being able to do this, still less could or can they do what in substance the plaintiff is seeking to do in this action—namely, treat a name as being property in itself which gives a right of action against any person using the name without their permission wholly irrespective of any other consideration. I need not deal with further defenses raised by the defendant. I have stated sufficient to show why, in my judgment, the action should be dismissed, and I accordingly dismiss it. But having regard to the conduct, or rather misconduct, of the defendant in relation to his use of the name "John Forrest," I dismiss the action without costs.

A trade-mark or trade name may be assigned, but only in connection with the business to which it is attached; an assignment of it in gross, followed by a use distinct from the business or goods to which it originally related, might readily make the

trade-mark or name an instrument of fraud and deception instead of a guarantee of genuineness: *Hall v. Barrows*, 4 De G., J. & S. 150; *Dixon Crucible Co. v. Guggenheim*, 2 Brews. 321; *In re Wellcome*, 32 Ch. D. 213; *Smith v. Fair*, 14 Ont. Rep. 729; *McVeagh v. Valencia Cigar Factory*, 32 U. S. Pat. Gaz. 1124; *McAndrew v. Bassett*, 4 De G., J. & S. 380; *Leather Cloth Co. v. American Leather Cloth Co.*, Ib. 137; 11 H. L. Cas. 523; *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Kidd v. Johnson*, 100 U. S. 617; *Cetton v. Gillard*, 44 L. J. Ch. 90; *Witthaus v. Braun*, 44 Md. 303; *Taylor v. Bemis*, 4 Biss. 406; *Skinner v. Oakes*, 10 Mo. App. 45; *Morgan v. Rogers*, 19 Fed. Rep. 596; *Oakes v. Tonsmierre*, 4 Woods, 547; *In re Rowley & Pyne*, 9 Vict. L. R. (L.) 307; *Goodman v. Meriden Britannia Co.*, 50 Conn. 139; *Walton v. Crowley*, 3 Blatch. 440; *Derringer v. Plate*, 29 Cal. 292; *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; *Samuel v. Berger*, 24 Barb. 163; *Baldwin v. Von Micheroux*, 25 N. Y. Supp. 857; *Le Page Co. v. Russia Cement Co.*, 5 U. S. App. 112; *Symonds v. Jones*, 82 Me. 302.

**Company—Similarity of name—Foreign company—
Right of foreign company to trade in England under its
foreign name.**

**SAUNDERS v. SUN LIFE ASSURANCE COMPANY
OF CANADA.**

(High Court of Justice, Chancery Division, Nov. 18, 21,
Dec. 7, 1893, March 17, 1894.)

[1893, S. 2837.]

[Reported L. R. [1894] Ch. D. 537.]

The defendants were incorporated in Canada under the name of "The Sun Life Assurance Company of Canada," and, after carrying on business in Canada under that name for over ten years, they opened an office in London, and claimed the right to carry on business in this country under their corporate name.

In an action for injunction by an English company, who had carried on business in this country for more than eighty years under the name of "The Sun Life Assurance Society:"

Held, (1) that, in the absence of fraud or dishonesty, the user by the defendants of their own corporate name without abbreviation, addition or other modification, involved no misstatement of fact, and could not, consistently with *Turton v. Turton*, 42 Ch. D. 128, be restrained by injunction; but *held*, (2) that the right of the defendants did not extend to the use of the name "The Sun" or "The Sun Life," without the addition of the words "of Canada."

Hendriks v. Montagu, 17 Ch. D. 638, and *Turton v. Turton*, discussed.

The plaintiff in this action was the actuary and registered public officer of the Sun Life Assurance Society, and by the writ in the action he claimed "an injunction to restrain the defendant company from carrying on in the United Kingdom the business of a life assurance company under the name of 'The Sun Life Assurance Company of Canada,' or under any other name of which the word 'Sun' forms a distinctive or conspicuous part, without clearly distinguishing the same from the name of the Sun Life Assurance Society; and from carrying on in the United Kingdom such business as aforesaid under such insignia or otherwise in such a manner as to be calculated to represent or lead to the belief that the defendant company is the Sun Life Assurance Society, or that the business carried on by the defendant company is the business of the said society."

The Sun Life Assurance Society, on whose behalf the plaintiff sued, was originally established in the year 1810 by the Sun Fire Office, an institution whose foundation dates back to 1710. The object of the society was to effect assurances on lives, and other assurances connected therewith. Its affairs were at first regulated by a deed of settlement dated the 15th of June, 1810, but are now governed by a private Act of Parliament, passed in 1889, with the title of "The Sun Life Assurance Act, 1889." It had, ever since 1810, carried on business in London, and had

many branches in the United Kingdom, and elsewhere in Europe, but not in America. Prior to 1891, the society carried on business in India; but in that year a company was formed with the name of "The Sun Life Assurance Company of India, Limited," for the purpose of taking over such Indian business. This company carried on Indian business only, and its affairs appeared to be managed by persons connected with the original Sun Life Assurance Society.

The defendant company was originally incorporated by an Act of the Candian Legislature (passed on the 18th of March, 1865) under the name of "The Sun Insurance Company of Montreal." By another Act of the same Legislature (passed on the 12th of May, 1870) the name of the company was changed to "The Sun Mutual Life Insurance Company of Montreal." By a third Act of the same Legislature (passed on the 17th of May, 1882) the name of the company was changed to "The Sun Life Assurance Company of Canada," which name it now bore. It appeared to have carried on business in Canada with great success ever since 1871, and to be a substantial company of good reputation, and possessed of very considerable assets. In the course of the present year 1893 it opened an office in the city of London, and began to carry on business there.

The plaintiff moved for an injunction.

Hastings, Q. C., Moulton, Q. C., and Sebastian, for the plaintiff, in support of the motion.—The inevitable result of what the defendants are doing will be that their company will be mistaken for the plaintiff's society. If the defendants were coming here and asking for registration of their company under the name they now propose to use, the case of *Hendriks v. Montagu*, 17 Ch. D. 638, is a conclusive authority that such registration would not be allowed.

It is well established that in such a case as this it is not necessary for the plaintiff to prove fraud. It is enough to

show that confusion is likely to arise, and here that is abundantly proved.

The question in *Turton v. Turton*, 42 Ch. D. 128, was as to the rights of English residents; but the question here is whether Colonials can do what English residents could not do.

[STIRLING, J.—The question here is, whether a colonial company incorporated under a name given to it by the Legislature of Canada, and having *bona fide* carried on business in Canada for ten years, is not entitled to trade in the United Kingdom under the name which it has thus lawfully acquired and used.]

That name was given to the company for the purpose of carrying on business in Canada, and nowhere else. There is no doubt that a man cannot be prevented from carrying on business in his own name merely because it happens to be also the name of a better-known manufacturer: *Turton v. Turton*, 42 Ch. D. 143. But this is not that case. This is an entirely new and different case. This is the case of a fancy name arbitrarily selected and used for eighty-three years by an old corporation. There is a strong analogy between the present case and cases of the foreign user of a trade-mark, which, it is well settled, does not give the right to registration in this country. The evidence in this case shows that if the defendant company are allowed to carry on their business as they are doing, or proposing to do, in this country, they will inevitably be referred to as "The Sun," or "The Sun Life," the words "of Canada" being naturally dropped for the sake of brevity. This has already happened, for in the books, papers and documents published by the defendant company they not infrequently refer to themselves as "The Sun" or "The Sun Life" without adding the words "of Canada." And though the defendant company themselves may not have any dishonest intention, it does not follow that all their agents will be equally pure. Besides, if the defendants, after having had their

attention called to the confusion and detriment which is likely to ensue, persevere in using in England the name of an old-established society, they will be guilty of fraud, however innocent their intentions were to begin with. At any rate, the plaintiff society is entitled to restrain the defendant company from designating themselves in such manner as will lead to the belief that their company is ours.

Finlay, Q. C., Buckley, Q. C., and C. B. McLaren, for the defendant company.—This is not the case of a company initiated abroad as a preliminary for coming to the United Kingdom and carrying on business there, but that of a colonial company, lawfully incorporated by a particular fancy name, which has for ten years carried on *bona fide* a large and increasing business in Canada and has acquired a great reputation there. This company, finding that, by reason of its colonial origin and sphere of business, the difference between English and colonial rates of interest, and other circumstances, it is in a position to offer exceptional advantages to English insurers, comes to England insisting on the special advantage incident to its colonial position, and opens an office here in its own name. Surely such a company is entitled to trade here under the name which has been given to it by the Legislature of Canada—under which, indeed, it is now being sued. Then, as to the similarity of name, its importance is greatly exaggerated. The case of an insurance company is not like that of a merchant or shopkeeper, where there is no opportunity for an intending purchaser to correct an initial mistake. Similarity of name between two insurance companies like these is a comparatively small matter. The form of our policies shows clearly that we are a Canadian company, and, long before completion, the necessary documents would disclose our colonial name and character, even if these had not been the attraction on the part of the insurer. Thus the danger of mistake in the case of

intending policy-holders is reduced to a nullity. This is a case in which it is impossible to attribute to the defendant company any dishonest design or intention to pass off their policies for those of the English Sun office, and there is, in fact, no more likelihood of confusion in this case than in that of the Sun Life Assurance Company of India. As a matter of principle, the name of a corporation is just as much its own name as that of an individual is his; and, according to the decision in *Turton v. Turton*, 42 Ch. D. 128, by which this case is governed, the defendant company is entitled honestly to use its own name, even though some confusion might result from its so doing, and even though (which is not likely in this case) some persons might be occasionally misled by the similarity.

Hastings, in reply.—The result of sanctioning proceedings like those of the defendants would be that a foreigner might start abroad under a name the use of which would be stopped in this country, and then, having lawfully acquired the name abroad, might come over here and use it with impunity; and thus a door would be opened which might be used for fraudulent purposes.

[He also referred to *Rousillon v. Rousillon*, 14 Ch. D. 351.]

STIRLING, J., Dec. 7, 1893 (after stating the facts of the case, continued).—The first part of the plaintiff's motion raises the question whether the defendant company is entitled to carry on the business of a life assurance company under the name of the Sun Life Assurance Company of Canada. It was not alleged that the defendant company had acquired the name of the Sun Life Assurance Company of Canada by any fraud or malpractice, or that the directors or agents of the defendant company had any fraudulent or dishonest intentions. It was said, and there is a considerable body of evidence which goes to show that, regard being had to the similarity of the names of the two companies, it is probable, or morally

certain, that in the ordinary course of business one will be confounded with the other to the great detriment of the old-established English company represented by the plaintiff; and it is further said that when the attention of the defendant company is called to this result that company ought to be treated in this court as guilty of fraud if it perseveres in making use of the name in this country, and ought to be restrained accordingly, however innocent the intentions of its advisers may have been in the first instance. Such a view prevailed in the case of *Hendriks v. Montagu*, 17 Ch. D. 638, where the Court of Appeal, at the instance of the Universal Life Assurance Society, restrained the English promoters of a projected new company from registering that company under the name of the Universe Life Assurance Association, and from carrying on business under that name; and this decision was much relied on by the plaintiff's counsel.

On behalf of the defendant company all dishonest intention was entirely repudiated as well in the correspondence and affidavits as at the bar; and it is said that the Sun Life Assurance Company of Canada is the corporate name of the defendant company duly conferred by the same legislative authority which called the corporation itself into being; and that in the absence of fraud or dishonesty the defendant company is entitled to use this name even although it may be possible or even probable that the public may be occasionally misled by the similarity of names. In support of this contention the case of *Turton v. Turton*, 42 Ch. D. 128, was relied on. It was there held that the plaintiffs, who carried on business under the style of *Thomas Turton & Sons*, were not entitled to restrain the defendants, a partnership firm consisting of John Turton and his two sons, from carrying on a business of a similar nature under the style of *John Turton & Sons*.

Neither case exactly covers the present. Each case is an application of the law laid down in *Burgess v. Burgess*,

3 De G., M. & G. 896, in which Lord Justice TURNER said, lb. 904: "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

The case of *Hendriks v. Montagu*, 17 Ch. D. 638, fell within the first of the two classes with which Lord Justice TURNER's judgment deals, viz., that where persons not having a particular name chose to use it for business purposes. That this was so appears from the explanations given by Lord ESHER, M. R., and Lords Justices COTTON and FRY in *Turton v. Turton*, 42 Ch. D. 128, which is an example of the second class. In that case Lord ESHER, M. R., says, lb. 136: "Upon principle I should say it is perfectly clear that if all that a man does is to carry on the same business, and to state how he is carrying it on—that statement being the simple truth—and he does nothing more with regard to the respective names, he is doing no wrong. He is doing what he has an absolute right by the law of England to do, and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." Lord Justice COTTON says, lb. 143: "It is a mere statement in ordinary language—an honest statement of the persons who carry on the business, and it must be dealt with in the same way, as if it was not the name of the firm describing those members who make up the firm, but the name of an individual

carrying on business in his own name. In my opinion the court cannot stop a man from carrying on his business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer." And, 42 Ch. D. 146: "The mere fact that the name used by the defendants is the same as that of another person, in my opinion will not justify the court in assuming that the defendants are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be, but in my opinion when a man fairly states the business which is carried on in his own name or in the name of his partners, it is not that his goods may be passed off as the goods of some other person: it is only a representation that they are made by himself." Lord Justice Fry says, 42 Ch. D. 147: "The legal question which emerges is this: Is the putting forth of such a statement by the defendants made actionable by the fact that it will be misapprehended by some persons, and that the plaintiffs will by reason of such misapprehension suffer loss? In my opinion that question must decisively be answered in the negative. It appears to me that to answer it in any other way is to interfere with the undoubted right of Her Majesty's subjects to use their own names and to make statements of fact which they are interested in making, and which they commit no wrong in making. If we were to hold that a cause of action arose from the misapprehension of the plaintiff's customers, we should be doing this, we should be creating a cause of action against the defendants by reason of the carelessness or stupidity of the plaintiffs' customers."

Many of the observations of their Lordships appear to me to apply to the present case. This is not the case of the creation or assumption of a fancy title by a new company. The name of "The Sun Life Assurance Company of

Canada" was conferred on the defendant company by the legislative authority to which it owes its existence as a corporation, and has been for eleven years, and is, the corporate name of the defendant company. That name the defendant company is entitled to use in deeds and other formal instruments; by that name, according to the practice of the English courts, the defendant company is entitled to sue; by that name it is being sued in this very action. The user of that name (provided it be without abbreviation, addition or other modification) involves no misstatement of facts; it is the simple truth that the defendant company is the Sun Life Assurance Company of Canada; and it seems to me that interference with the use of that name, for the ordinary purposes of the business which the defendant company was incorporated to carry on, is open to the same objections as were considered by the Court of Appeal to be sufficient to prevent the granting of any injunction in *Turton v. Turton*, 42 Ch. D. 128. I am, therefore, unable to make any order on the first branch of the motion, so far as it seeks to restrain the defendant company from using the name, "The Sun Life Assurance Company of Canada."

The second branch of the plaintiff's motion seeks to restrain the defendant company from carrying on in the United Kingdom the business of a life assurance company under any name (other than that of the Sun Life Assurance Company of Canada) of which the word "Sun" forms a distinctive or conspicuous part without clearly distinguishing the same from the name of the Sun Life Assurance Society, and from carrying on such business under such insignia, or otherwise in such a manner as to be calculated to represent or lead to the belief that the defendant company is the Sun Life Assurance Society, or that the business carried on by the defendant company is the business of the said society.

In a letter written on the 27th of May, 1893, the plaintiff objected to the use by the defendant company of a device of Phœbus driving a chariot of the sun, which bears a like-

ness to a device of a like nature used by the plaintiff company. By a letter of the 23d of June, 1893, the defendant company undertook to discontinue that user. In my opinion the representatives of that company were well-advised so to do, and it is much to their credit that they gave way so readily on this point, it now appearing that the defendant company's device was used by it in America for a considerable time before the English company began to use its device in this country. No complaint is now made of the user by the defendant company of this device.

As regards the user of the name of the "Sun," the position taken up by the legal advisers of the defendant company in the letter of the 23d of June is, in my opinion, in strict accord with the legal rights of that company. "You may take it from us," say they, "that under no circumstances will our clients ever use their title except in connection with the words 'of Canada,' and those words shall be used as prominently as the other words of the title." The plaintiff complains that this promise had not been adhered to, and the evidence on this head calls for examination.

[His Lordship then examined in detail the evidence on this point, instancing several books, papers and documents issued by the defendant company, in which they referred to themselves as "The Sun," or "The Sun Life," an example of which was found in the instructions issued to their agents, in which, after advising them to insure their lives with the company, they said: "If the person you are canvassing asks, 'Are you insured in the Sun?' and you have to give a negative answer, what becomes of your arguments?" The learned judge then continued:]

In addition to this, it is shown that letters and newspapers have been sent to the agents of the plaintiff company on the addresses of which the defendant company was described as "The Sun Life Assurance Company," without the addition of the words "of Canada;" and there are also put in evidence certain other documents made use of by the

defendant company, and evidently intended for use in England, in which the defendant company is spoken of as "The Sun Life." The explanation given on behalf of the defendant company is that all the documents complained of were originally prepared for circulation in Canada; and it is stated that in circulating them in England the defendant company had no desire to disguise its true name. As regards the annual report for 1892 of the defendant company, at the top of the cover of which the words "The Sun Life" appear in large letters, while the words "of Canada" are at the bottom and smaller, a new cover has been printed, and is used on this document as now circulated; but the interior, in which the words "Sun Life" appear several times without the words "of Canada," remains the same.

It is not surprising that the directors of the English company should regard these matters with anxiety. While I am not persuaded that in any one of the documents relied on by the plaintiff the term "The Sun" or "The Sun Life" is used in such a way as to be calculated to deceive, I think that the practice evidently indulged in by the agents in this country of the defendant company, of speaking and writing of that company as "The Sun" or "The Sun Life," is dangerously lax. Such practice, if adopted by the general agents of the defendant company scattered up and down the country, might lead to grave consequences. I have held that the defendant company is entitled to use in this country its full corporate name; but, in my opinion, the right does not extend to the use of the name of "The Sun" or "The Sun Life" without the addition of the important words "of Canada," and I think that those who are responsible for the management of the defendant company's affairs cannot keep this too firmly before their own minds or impress it too strongly upon their subordinates. In my judgment it is to be regretted that in a manual intended for the use of the general agents of the defendant company in this country

there is not to be found an express direction on this point, and that there should be found what amounts, or seems to amount, to a suggestion that the defendant company may properly be spoken of in this country as "The Sun."

I can readily understand that such a practice may have originated and be perfectly harmless in Canada, where no other company of a similar name carries on business; but here strict regard ought to be had to the rights of others by a company desirous, like the defendant company, of availing itself to the full of such legal rights as it may possess. If such a practice as I have mentioned were continued after the attention of the defendant company has been called to it (as it now has), I should be led to draw inferences most unfavorable to the defendant company; but I do not think I am compelled to do so at this stage. The defendant company repudiates the imputation of dishonesty; the plaintiff's counsel have pointedly abstained from making such a charge, and, under all the circumstances, I think it better to give the defendant company the opportunity of supplying that which seems lacking. I therefore propose to direct the latter part of the motion to stand to the trial, unless, indeed, the parties are desirous now to put an end to the action; in which case I should be willing to consider any undertaking which the defendant company may think fit to offer, or to express my own opinion of what that company ought to do. There will be no order on the motion so far as it seeks to restrain the defendant company, their officers, servants and agents, from carrying on in the United Kingdom the business of a life insurance company under the name of the Sun Life Assurance Company of Canada; the rest of the motion will stand over to the trial.

March 17, 1894.—The case was again mentioned, and the motion was agreed to be treated as the trial, and an undertaking was given by the defendants in accordance with the judgment on the motion.

Every person has the right to the use of his own name in the conduct of his business, and if it be not fraudulently used with intent to persuade purchasers and others that the goods sold or business carried on are not the goods or the business of the person using his own name, but of some other person of the same or similar name, equity will not enjoin the use of this name, although in point of fact damage may be done to the latter person by the common use of the name: *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Turton v. Turton*, L. R. 42 Ch. D. 128; *Burgess v. Burgess*, 3 De G., M. & G. 896; *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527; *England v. New York Publishing Co.*, 8 Daly, 375; *Gilman v. Hunnewell*, 122 Mass. 139; *Decker v. Decker*, 52 How. Pr. 218; *Caswell v. Hazard*, 121 N. Y. 484; *Meneely v. Meneely*, 62 N. Y. 489; *Faber v. Faber*, 49 Barb. 357; *Clark v. Freeman*, 11 Beav. 112; *Hallett v. Cumston*, 110 Mass. 29. The same rule applies to corporations: *Employers' Liability Assur. Comp. v. Employers' Liability Ins. Co.*, 24 Abb. N. C. 268. If, however, there is a fraudulent use of the name an injunction may issue. This fraudulent use is a matter of evidence. It may be shown by the use of an initial in place of a full name, as where the plaintiffs did business as *Joseph Rodgers & Sons*, and stamped their goods (cutlery) "*J. Rodgers & Sons*," and the defendants, John Rodgers and his sons, formed a partnership and stamped their goods, also cutlery, "*J. Rodgers & Sons*:" *Rodgers v. Newell*, 3 De G., M. & G. 614; and see *Meriden Britannia Co. v. Parker*, 39 Conn. 450; or where in connection with the common name a device similar to that of the plaintiff is used: *Taylor v. Taylor*, 23 L. J. Ch. 255; *Stonebraker v. Stonebraker*, 33 Md. 352; or where, in the same connection, a package similar to that of the plaintiff is adopted: *Croft v. Day*, 7 Beav. 84; *Blofield v. Payne*, 4 B. & Ad. 410; *Bininger v. Wattles*, 28 How. Pr. 206; *Holloway v. Holloway*, 13 Beav. 209; *Jennings v. Johnson*, 37 Fed. Rep. 364; or where the name is used in such connection with the title of a brand of goods, without anything to distinguish the goods of one party from those of the other, as would naturally mislead the public as to the origin of the goods: *Landreth v. Landreth*, 22 Fed. Rep. 41; *Shaver v. Shaver*, 54 Iowa, 208; *Devlin v. Devlin*, 69 N. Y. 212. Fraud may be found where the person

whose name is used is not the real proprietor of the defendant's business, but has been given an interest because his name is the same as that of the plaintiff, or where his name is given prominence on account of the sameness: *Marsden v. Thorley's Cattle Food Co.*, L. R. 6 Ch. D. 574; 14 Ib. 748 (in which case *JAMES*, L. J., commented on and disapproved of *James v. James*, L. R. 13 Eq. 421); *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886; and see *Tussaud v. Tussaud*, L. R. 44 Ch. D. 678; and see, also, for examples of fraudulent use of name, *Wolfe v. Barnett*, 24 La. Ann. 97; *Burke v. Cassin*, 45 Cal. 467; *Lee v. Haley*, L. R. 3 Ch. App. 155; *Scott v. Scott*, 16 L. T. N. S. 143; *Southorn v. Reynolds*, 12 Ib. 575.

A corporation will not be permitted to use a name so nearly like that of another, engaged in the same business, as to mislead the public, if there be any evidence of fraud, and as the title of a corporation is arbitrarily adopted by those forming it, the mere fact of the close similarity to that of another corporation is generally evidence of fraud: *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *U. S. v. Roche*, 1 McCrary, 385; *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278; *London, etc., Assurance Society v. London, etc., L. Ins. Co.*, 11 Jurist, 938; *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313; *Merchants' Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250. The mere fact that confusion may exist on account of the resemblance of corporate names, when the goods manufactured by the two corporations are totally different does not justify equitable interposition: *Richardson & B. Co. v. Richardson & M. Co.*, 55 Hun, 606.

Ultra vires—Mutual benefit order—Powers—Assignment to secure debt—Validity.

COMMONWEALTH v. SUFFOLK TRUST CO.

(Supreme Judicial Court of Massachusetts, Suffolk,
June 21, 1894.)

On appeal from the decree of a single justice, the parties cannot, without his sanction, add to or diminish the record.

A mutual benefit order deposited money with a trust company, which thereafter became unable to repay it. The benefit order then assigned the fund to another in terms to secure a promissory note given for a loan, and the money thus obtained was disbursed in the usual course of business. *Held*, that as the effect of the assignment was to secure the debt, it was not *ultra vires*, conceding that the benefit order could not legally make a promissory note.

The loan to secure which the assignment was given having been authorized at a meeting of the order, and the money obtained used for its benefit, equity will not, at the instance of the receiver of the insolvent depositary, forbid its payment to the assignee out of money in his hands, on the ground that the officers executing the assignment had no authority to do so.

Appeal from a justice of the Supreme Judicial Court, sitting in Suffolk county.

In the matter of the receivership of the Suffolk Trust Company. From a decree allowing the claim of the International Trust Company the receiver appeals. Affirmed.

Joseph R. Smith, for appellant.

Robert M. Morse and *George P. Wardner*, for appellee.

LATHROP, J.—This is an appeal by the receiver of the Mutual Life Endowment Order from a decree of a single justice of this court, directing the receiver of the Suffolk Trust Company to pay to the International Trust Company the sum of \$2,000, with interest at the rate of seven per cent. per annum from the 30th day of March, 1892. Before

the case was heard by the single justice, it was sent to a master, who heard the parties and made a report which, with certain exhibits annexed thereto, appears in the papers before us. After the appeal was taken, the counsel for the respective parties, without the sanction of the justice who heard the case, made an agreement as to certain evidence which the agreement states was put in before the single justice, and as to the contents of certain exhibits annexed to the master's report, which are not set forth in those exhibits as annexed. This proceeding was wholly irregular. An appeal from the decree of a single justice brings up merely the record of the case, and parties cannot, at least without the sanction of the single justice, add to or diminish the record. The question before us, on such an appeal, is whether the decree is justified by the record. From the record in this case the following facts appear: The Mutual Life Endowment Order, a corporation established under the laws of New Hampshire, in 1891 had a deposit of \$10,000 in the Suffolk Trust Company, standing in the names of George F. Morse, president, and Edwin J. Morse, treasurer. On September 25, 1891, these persons not being able to draw out the \$10,000, or any part of it, on account of the failure of the Suffolk Trust Company, which was then in the hands of a receiver, and, desiring to obtain \$2,000 for the purposes of the corporation of which they were officers, borrowed \$2,000 from the International Trust Company, and gave an assignment in writing of the claim of the Mutual Life Endowment Order against the Suffolk Trust Company as security therefor. The assignment purported to be the instrument of the order, to be executed by it "by Edwin J. Morse, supreme treasurer," and to be assented to by "George F. Morse, supreme president." The assignment recited that it was "made to secure the payment of the promissory note of the said Mutual Life Endowment Order to the said International Trust Company of even date herewith, for the sum of two thousand dollars." At the same

time a promissory note of the order for \$2,000, with interest at the rate of seven per cent. per annum, was delivered to the International Trust Company. The money so received was paid out to certificate holders in the usual course of business, just as if it had been drawn from the Suffolk Trust Company, and in accordance with the rules of the order. No question was made by any of the members of the order as to the validity of this transaction, or by any one else except by the receiver of that order. The receiver conceded that the Mutual Life Endowment Order had, under the laws of the state of New Hampshire, the power to make contracts necessary and proper for the transaction of its authorized business; but he contends that, as it was a fraternal benevolent association, it had no power to borrow money, and that the transaction in question was *ultra vires*.

We have no occasion to consider the question whether generally such a corporation has or has not the power to borrow money, or whether an action could be maintained against it upon its promissory note. It had undoubtedly the power to deposit its money in the Suffolk Trust Company, and to draw it out from time to time, as needed in the course of its business. On the failure of the Suffolk Trust Company, a claim against it accrued in favor of the Mutual Life Endowment Order. This claim it could collect, or, if the exigencies of its business required, it could sell outright. And we have no doubt that it could assign the claim by way of pledge. It was certainly reasonable that it should do so, under the power to make contracts necessary and proper for the transaction of its authorized business, and we have no doubt that the transaction in this case, which, in effect, was merely a device to draw money which could not be got directly, was valid. While the assignment was in terms to secure the note, the effect of it was to secure the debt. Equity in such a case disregards the form, and looks at the real nature of the transaction. In *Scott v. Colburn*, 26 Beav. 276, the directors of a com-

pany were prohibited from giving bills of exchange, but had the power to borrow on mortgage. They, however, gave bills of exchange to secure an existing debt, and a mortgage was at the same time executed under the seal of the company, conditioned on the payment of the bills. It was held that the mortgage was to be regarded as given to secure the debt, and not the payment of the bills, and therefore was not invalid.

It was further contended by the receiver that George F. Morse and Edwin J. Morse had no authority to execute the assignment. The by-laws of the order provided that the officers should be a president, clerk, treasurer, secretary, superintendent and three trustees; that these officers should constitute a supreme executive board, with the power of directors; that they should have in general "all the powers of the corporation except as limited by the vote of the stockholders;" and that four should constitute a quorum of the board. On July 25, 1891, the two Morses bought the shares of stock of the other incorporators. All of the other officers resigned except one—the clerk—and he and the two Morses continued to act as the officers of the order. Notices of these changes were sent to the certificate holders, and it did not appear that any question was made in regard to the validity of the transaction or as to the authority of the Morses to act or to conduct the affairs of the order. At the time the Morses were appointed president and secretary, they held the offices of superintendent and trustee, and it does not appear that they resigned these offices. There is nothing in the by-laws to show that a person could not hold two offices, and, when the officers were first elected, Warren was chosen both clerk and trustee. Without, however, considering whether they could legally act as directors under the by-laws, so as to hold a directors' meeting, it appears by the master's report that the meeting which authorized the supreme secretary, with the assent of the supreme president, to borrow money to meet the liabilities of the order, was a

meeting of the order, and not a meeting of the directors. As the Morses were then the only stockholders, and passed the vote, and have ever since acquiesced in it, and the order has received the benefit of the money, we see no ground upon which the receiver can ask a court of equity to forbid the payment of the debt out of the fund in the hands of the receiver of the Suffolk Trust Company. Decree affirmed.

The mere fact that a corporation is devoid of power to borrow money in a particular way or upon a particular security does not enable it to get rid of all liability to repay money which it has received. Equity will look at the substance rather than at the form, and if there be any way in which a person who has advanced money in good faith can be properly repaid equity will not hesitate to ignore the form if it stand in the way of a recovery. Thus a mortgage to secure bills, the company having the power to mortgage but being prohibited from issuing bills, was in *Scott v. Calhoun*, 26 Beav. 276 upheld as a security for the debt, and where a corporation has no right to mortgage but does borrow on mortgage the mortgage may be passed over and the debt for which it was given may stand as a simple debt: *Payne v. Mayor of Brecon*, 3 H. & N. 572; *Holdsworth v. Mayor of Dartmouth*, 11 Ad. & E. 490; *Utica Ins. Co. v. Scott*, 19 Johns. 1. In *Pratt v. Short*, 79 N. Y. 437, a corporation which could not give negotiable paper was held liable for the amount of the loan issued upon such securities, and see *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Same v. Cadwell*, 3 Wend. 296; *Underhill v. Santa Barbara Land Co.*, 93 Cal. 300; and even where a corporation cannot borrow money, or can only borrow in a certain way, yet when money is borrowed by it, or is borrowed for it by officers who are not authorized so to do, money so obtained and applied to the company's uses must in equity be repaid. See *Re German Mining Co.*, 4 De G., M. & G. 19, in which case the Lord Justices held that the company had no right to borrow money and hence that advances obtained by the directors did not constitute a debt of the company, but inasmuch as the money thus obtained had been applied in paying off debts, which the directors had authority to contract, the lenders were entitled to

recover. See, also, *Lowndes v. Garrett, etc., Mining Co.*, 33 L. J. Ch. 418; *Re Cork v. Yonghal Ry. Co.*, L. R. 4 Ch. 748; *Ulster Ry. Co. v. Bainbridge, etc., Ry. Co.* 143; *Re Norwich Yarn Co.*, 22 Beav. 143; *Hoare's Case*, 30 Ib. 225; *Re Magdalena Steam Nav. Co.*, Johns. V. C. 690; *Baker's Case*, 1 Dr. & Sm. 55; *Troup's Case*, 29 Beav. 353. The rule laid down by Sir John ROMILLY in *Troup's Case* is "when the directors of a company have no power to borrow money, the repayment of money cannot be enforced by the lender against the company, yet if the money has been *bona fide* applied to the purposes of the company the *bona fide* lender is entitled to payment as against the company."

Fraudulent conveyance—Use of property by grantor.

BANK OF IUKA v. DOAN.

(Supreme Court of Alabama, April 23, 1894.)

When the beneficiary of a deed of trust conveying "all the property used or acquired in carrying on" a tannery, permits the grantor to buy, sell and ship the leather or other products of the business in his own name, the deed becomes void as against the grantor's creditors.

Appeal from Chancery Court, Tishomingo county; BAXTER McFARLAND, Chancellor.

Suit by John E. Doan against the Bank of Iuka. There was a judgment for plaintiff, and defendant appealed.

Complainant filed this bill, alleging that on November 26, 1889, complainant had possession, control and management of a tanyard, tools and machinery, and was the owner of all the hides then in the vats and house, and all the bark; that on that day he made a contract with one Anfield, agreeing to deliver to him all said property, and to deposit with E. J. McRea \$2,000, to be used by Anfield in carrying on the business; that the contract provided that Anfield was to ship all the leather in complainant's name, as his property, as fast as ready; that at the maturity of the note, if it was not paid, complainant was authorized to take pos-

session of said yard, and work out the hides, and apply the proceeds on his note; that the contract was a lien on all the property used or acquired in carrying on the tanyard in favor of complainant; that the contract was of record; that Anfield carried on the business under said contract until April 7, 1892, when he turned over to complainant all the hides, leather, bark, tools and stock, to be disposed of according to the contract; that at that time Anfield owed complainant \$3,243.11 (the contract of turning over was in writing, and made an exhibit to the bill, as was also the original contract); that on and after April 7, 1892, complainant was in open and notorious possession of the yard and other property described in the contract, and had absolute control of same, and was entitled to all of said property, and the proceeds of same; that at various times after April 7, 1892, a large lot of said leather was surreptitiously taken from said yard by Anfield, who was employed by complainant as a day laborer, and shipped to the E. Hartman Hide & Leather Company, of St. Louis, and the bills of lading were indorsed to defendant; that Anfield made as many as three shipments of leather, and either by indorsing the bills of lading to defendant, or giving it an order on Hartman & Co., turned it over to defendant; that defendant received a large sum of money from the leather so shipped, but the president of the bank had refused to show what amount; that complainant had called on the Hartman Hide & Leather Company for such information, which had been refused; that defendant had received the proceeds of the leather so shipped, and credited the same to Anfield, in payment of a pre-existing debt; that defendant knew of the contract between complainant and Anfield, and knew of the turning over of the property to complainant, prior to the shipments; that complainant is entitled to receive from defendant all money received by it from the sales of said leather; that he was the owner thereof, and was entitled to personal decree for the amount so received by defendant; that

Anfield shipped some leather a short time before he delivered the tanyard to complainant ; and that he is entitled to the proceeds of same. The prayer is for discovery by defendant of money and leather it has received from Anfield, and that dates and amounts of shipments and remittances from sales of any leather, and for an account, and for a personal decree for the amount found due. The contract between complainant and Anfield was made an exhibit to the bill, and shows, in addition to what the bill alleges, that the tanyard belonged to Estis, Doan & Co. ; that Anfield gave his note, at the time the contract was made, for \$4,948.50, which was composed of the \$2,000 left with McRea, with one year's interest thereon, and an amount agreed on for bark, and interest on that for one year, and that the note was payable twelve months after date, and that Anfield was to pay the note on or before it was due ; that complainant was not to be liable for any debts contracted by Anfield, and, if Anfield should die, complainant should take possession of the property, sell it, and apply the proceeds to the payment of his debt. The contract was to remain in force for twelve months. The answer admits that complainant was in control and management of the tanyard when the contract was made, in 1889, but denies that the ownership of the yard, bark, hides, etc., was in complainant, and claims that the contract, by its very terms, expired in twelve months, or when the note became due. Denies that Anfield operated the tanyard under said contract till April 7, 1892. Alleges that the contract expired November 26, 1890, and that on March 11, 1891, Z. N. Estis and Emma J. Doan, executrix of J. H. Doan, sold the tanyard and all appurtenances, etc., to Anfield, and made him a deed to same, and took from him a deed of trust to secure the purchase price ; that Anfield continued to be the owner thereof until April 26, 1892 ; that complainant knew of said sale at the time, and set up no adverse claim to it ; that from November 26, 1889, to March 11, 1891, Estis, Doan &

Co. were the owners of said property ; that complainant was not the owner of the property, or of the note for \$4,948.50 ; that neither complainant nor Anfield enforced the contract between them in any way, with regard to the shipment of leather or the management of the tanyard. Denies that Anfield turned over to complainant, April 7, 1892, the tanyard and appurtenances, and denies that Anfield was indebted to complainant in any sum on said date. Denies that, on and after said date, complainant was in open and notorious possession of all hides, leather, etc., described in said contract, and denies that he had control of said property, or any part of it, or was entitled to the proceeds of same. Alleges that on April 7, 1892, and up to April 28, 1892, Anfield was in possession, control and management of said property, running it as his own, as he had been doing since November, 1889 ; that there was no notice of change of ownership or possession, and nothing to put third persons on inquiry ; that even if the property did become the property of complainant on April 7, 1892, he gave no notice of it, but left it in Anfield's possession, as it had been before, and it was liable for the debts of Anfield. Denies that any leather was surreptitiously removed and shipped. Admits that on April 18, 1892, Anfield openly shipped 3,600 pounds of leather to the Hartman Hide & Leather Company, and the bill of lading indorsed to defendant, but that this was before defendant heard of the alleged transfer of April 7, 1892, and that Anfield openly shipped the leather in his own name, as he had been doing before, and that he owed defendant, and it had no notice of any change of ownership until April 28, 1892 ; that on March 17, 1892, Anfield was indebted to defendant in the sum of \$1,034.96, and then executed a note and trust deed to secure it on all the stock of the tanyard, including all the leather, hides, etc. ; that the indebtedness accrued by credit extended Anfield as the owner of the tanyard and all the property situated therein, and would not have been so extended if he

had not been the apparent owner, and that Anfield agreed to get the leather ready to ship, and ship it to pay defendant; that, when the deed of trust was made to defendant, Anfield was in notorious possession of the property, claiming it as his own; that, in pursuance of Anfield's verbal agreement, he shipped on or about April 21, 1892, some leather to the Hartman Hide & Leather Company, and gave one E. J. McRea, a near relative of complainant, a draft on said Hartman & Co. for \$250, to be paid out of said shipment, and defendant discounted it, and that Anfield then gave defendant an order on Hartman & Co. for the balance due him; that about April 7, 1892, Anfield made another shipment to Hartman & Co., and gave said McRea another draft for \$250 against the proceeds, and the defendant an order for the balance due; that about June 3, 1892, complainant instructed Hartman & Co. not to pay defendant for the leather shipped by Anfield, and then telegraphed them to pay it to defendant; that ever since November 26, 1889, Anfield had been shipping leather and hides in his own name, and receiving and using the proceeds, and complainant had notice of this; that after November 26, 1889, complainant transferred the note to his mother; and that Anfield had made all payments to her. The case was heard on bill and answer and proof. The chancellor found for complainant, and ordered an accounting by a commissioner, and rendered a decree for complainant for \$1,422.69, and from this decree defendant appealed.

Clayton & Anderson, for appellant.

J. M. Boone, for appellee.

CAMPBELL, C. J.—The decree is not supported by any view we can take of the case, as to the two drafts for \$250 each by Anfield, in favor of McRea, cashed by the bank. These drafts were drawn against consignments of leather which Anfield had the permission of Doan to make, and the bank had the right to purchase the drafts, and did not

incur any responsibility to Doan by doing it. But a broader question disposes of the whole case. The contract between Doan and Anfield, whereby Doan was to have a lien "on all the property used or acquired in carrying on the tannery," although valid and unobjectionable on its face, was so dealt with by the parties to it as to make it fraudulent and void as to the creditors of Anfield, according to the established doctrine in this state, as evidenced by the cases of *Harman v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843; *Britton v. Criswell*, 63 Miss. 394; *Hitchler v. Bank*, *Ib.* 403; *Baldwin v. Little*, 64 Miss. 126, 8 South. 168; *Johnston v. Tuttle*, 65 Miss. 492, 4 South. 553—a doctrine which I, who write this opinion, do not, and have never, cordially subscribed to. Doan not only acquiesced in Anfield's carrying on the tanyard for two years and a half, nearly (one and one-half years after the maturity of the debt secured), buying hides, selling leather and refilling vats with hides to be tanned; shipping leather, selling it, and drawing for the proceeds as if he was the owner—but Doan expressly authorized the shipment of leather in Anfield's name. Under the circumstances, according to the established doctrine, Doan's claim on Anfield must be subordinated to the rights of creditors of Anfield other than Doan. Why, it would be difficult to find a reason, except "*Ita lex scripta est*," and so it will be written here. It seems that President HYATT formed a correct judgment as to the sufficiency of the mortgage claimed by Doan—whether on the ground on which this decision rests, or not, is not material, since the result is the same, and the bank reaps the fruits of his judgment.

Reversed, bill dismissed and decree against complainant, Doan, for all costs in this and the Chancery Court.

Where after a written contract, by deed or otherwise, which provides for the gift or sale, either absolutely or by way of security, of personalty, possession is retained by the donor, vendor

or mortgagor, with the consent of the donor or vendee, the retention of possession is, generally speaking, proof of fraud, and will render the transfer void as against the creditors of the donor or vendor without notice. This is because the usual method of transferring ownership of goods or other personalty is by the transfer of the possession or actual dominion and because the ostensible possession is a tacit assertion of ownership on the faith of which credit may naturally be given: *Cadogan v. Kennett*, 1 Cowp. 434; *Ward v. Audland*, 16 M. & W. 870; *Shower v. Pilck*, 4 Exch. 478; *Flory v. Denny*, 7 Ib. 583; *Neate v. Latimer*, 2 Y. & C. Ex. 257; *Edwards v. Harben*, 2 T. R. 587 (but see as to this case *Martindale v. Booth*, 3 B. & A. 458; Serj. BENJAMIN however points out that the case has never been overruled, and is of opinion that in a case in which there was nothing but the absolute conveyance without possession it would be followed. He also points out, however, the guarded character of the judge's announcement of the law: *Benj. Sales*, § 485); *Hamilton v. Russel*, 1 Cr. 309; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Bissell v. Hopkins*, 3 Cow. 166; *U. S. v. Hare*, 3 Cr. 73; *D'Wolf v. Harris*, 4 Mason, 515; *Meekes v. Wilson*, 1 Gall. 419; *Sturtevant v. Ballard*, 9 Johns. 337; *U. S. v. Conyngham*, 4 Dall. 358; *Phittiplace v. Sayles*, 4 Mason, 312; *Kennedy v. Ross*, 2 Mill, 125; *Thornton v. Cook*, 97 Ala. 630; *Means v. Dowd*, 128 U. S. 273; *Crouch v. Carnes*, 16 Conn. 505; *Foster v. Grigsby*, 1 Bush, 334; *Jarvis v. Davis*, 14 B. Mon. 529; *Waller v. Cralle*, 8 Ib. 11; *Hildeburn v. Brown*, 17 Ib. 779; *Allen v. Massey*, 17 Wall. 351; *Clafin v. Rosenberg*, 42 Mo. 439; *Bishop v. O'Connell*, 56 Ib. 158; *Wright v. McCormick*, 67 Ib. 426; *Steward v. Nelson*, 79 Ib. 522; *Doak v. Brubaker*, 1 Nev. 218; *Wilson v. Hill*, 17 Ib. 401; *Chumar v. Wood*, 6 N. J. L. 155 (but see later New Jersey decisions); *Collins v. Myers*, 16 Oh. 547 (but see later Ohio cases, especially *Kleine v. Katzenberger*, 20 Ib. 110); *Clow v. Wood*, 5 S. & R. 275; *McKibbin v. Martin*, 64 Pa. 356; *Allen v. Knowlton*, 47 Vt. 512; *Burrows v. Stebbins*, 26 Ib. 659; *White v. Miller*, 46 Ib. 65; *Piper v. Hilliard*, 52 N. H. 209; *Putnam v. Osgood*, 51 Ib. 192.

There are, however, numerous authorities to the effect that want of possession is merely *prima facie* evidence of fraud: *Brooks v. Powers*, 15 Mass. 244; *Bartlett v. Williams*, 1 Pick.

288; *Briggs v. Parkman*, 2 Metc. (Mass.) 258; *Gates v. Mowrey*, 15 Gray, 564; *Ulmer v. Hills*, 8 Greenl. 326; *Wash v. Medley*, 1 Dana (Ky.), 269 (but see *Laughlin v. Ferguson*, 6 Ib. 117); *Martindale v. Booth*, 3 B. & Ad. 498 (in which the doctrine announced by *BULLER, J.*, in *Edwards v. Harben*, *supra*, is criticised and want of possession treated as evidence only); *Lindon v. Sharp*, 6 M. & G. 898; *Fitzgerald v. Meyer*, 25 Neb. 77; *Calter v. Copeland*, 18 Me. 127; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Shaw v. Wilshire*, 65 Me. 485; *Hudson v. Warner*, 2 Har. & G. 415; *Folsom v. Clemence*, 111 Mass. 273; *Sleeper v. Clapman*, 121 Ib. 404; *Towne v. Fiske*, 127 Ib. 125; *Gould v. Ward*, 4 Pick. 104; *Hatch v. Fowler*, 28 Mich. 205; *Waite v. Mathews*, 50 Ib. 392; *Edwards v. Edwards*, 54 Ib. 347; *Blackman v. Wheaton*, 13 Minn. 326; *Weston v. Sumner*, 31 Ib. 456; *Comstock v. Rayford*, 20 Miss. 369; *Coppage v. Barnett*, 34 Ib. 621; *Bullitt v. Taylor*, Ib. 708; *Ketchum v. Brennan*, 53 Ib. 596; *Botcher v. Berry*, 6 Mont. 448; *Helena Bank v. McAndrews*, 5 Ib. 325; *Robison v. Uhl*, 6 Neb. 328; *Miller v. Morgan*, 11 Ib. 121; *Densmore v. Tomer*, Ib. 118, 14 Ib. 392; *Chicago Lumber Co. v. Fisher*, 18 Neb. 334; *Parker v. Marvell*, 60 N. H. 30; *Miller v. Pancoast*, 29 N. J. L. 250; *Parr v. Brady*, 37 Ib. 201; *Martin Safe Co. v. Norton*, 48 N. J. L. 410; *Hanford v. Archer*, 4 Hill, 271; *Stewart v. Slater*, 6 Duer, 85; *Mathews v. Poultney*, 33 Barb. 127; *Juliand v. Rathbone*, 39 Ib. 102; *Ball v. Loomis*, 29 N. Y. 415; *Tilson v. Terwilliger*, 56 Ib. 8; *Rea v. Alexander*, 5 Ired. L. 644; *State v. Bethune*, 8 Ib. 139; *Holmes v. Marshall*, 78 N. Car. 262; *Boone v. Hardie*, 83 Ib. 470; *Thorne v. First National Bank*, 37 Oh. St. 254; *Monroe v. Hussey*, 1 Oreg. 188; *McCully v. Schwackhamer*, 6 Ib. 438; *Goodell v. Fairbrother*, 12 R. I. 233; *Mead v. Gardiner*, 13 Ib. 257; *Beckwith v. Burroughs*, Ib. 294; *Ewing v. Markley*, 3 Utah, 404; *Kevan v. Branch*, 1 Gratt. 274; *Forkner v. Stuart*, 6 Ib. 197; *Sipe v. Earman*, 26 Ib. 563; *Wray v. Davenport*, 79 Va. 19; *Manufacturers' Bank v. Rugee*, 59 Wisc. 221; *Thornton v. Smith*, 39 Tex. 544.

In this conflict of authority the matter has been regulated in many states by statute, but it may be said that in all possession after parting with title is looked on as strong evidence, if not a badge, of fraud, and it will require in most states clear evidence of innocent intent to overcome its effect.

The presumption of fraud arising from retention of possession may in those jurisdictions where retention of possession is not *per se* proof of fraud, be rebutted by the circumstance that the retention is in accordance with the terms of the deed and in fulfillment of its purposes; provided, of course, the purpose be honest; for example, where a mortgage is given of realty and personalty thereon together: *Steward v. Lombe*, 1 Brod. & B. 506; *Mather v. Fraser*, 2 K. & J. 536; *Exp. Mone v. Robinson's Banking Co.*, L. R. 14 Ch. D. 379; so where a bill of sale by way of mortgage is given by one who carries on a business upon certain premises in order to secure goods sold and money advanced for the purpose of carrying on said business: *Cook v. Walker*, 3 W. R. 357, and see *Weaver v. Joule*, 3 C. B. (N. S.) 309.

A mortgage of goods, left in the possession of the mortgagor with permission to deal with them in the usual course of business until default, has been held in the following cases not to be *ipso facto* fraudulent, but at most, evidence of fraud: *Goodrich v. Williams*, 50 Ga. 425; *McLoughlin v. Ward*, 77 Ind. 383; *Lockwood v. Harding*, 79 Ind. 49; *McFadden v. Fritz*, 90 Ib. 590 (overruling *Mobley v. Letts*, 61 Ib. 11); *Fisher v. Syfers*, 109 Ib. 514; *Muncie Nat. Bank v. Brown*, 112 Ib. 474; *Overman v. Quick*, 8 Biss. 134; *Marsh v. Bird*, 22 Fed. Rep. 576; *Sperry v. Etheridge*, 63 Iowa, 543; *Meyer v. Evans*, 66 Ib. 179; *Ross v. Wilson*, 7 Bush. 29; *Googins v. Gilmore*, 47 Me. 9; *Stidman v. Vickery*, 42 Me. 132; *Brinley v. Spring*, 7 Me. 241; *Hamilton v. Rogers*, 8 Md. 301; *Rose v. Bevan*, 10 Ib. 466; *Cobb v. Farr*, 16 Gray, 597; *Fletcher v. Powers*, 131 Mass. 333; *Blanchard v. Cook*, 144 Ib. 207; *People's Bank v. Bates*, 120 U. S. 556; *Morse v. Riblet*, 22 Fed. Rep. 501; *Hilts v. Stockwell Furniture Co.*, 23 Ib. 432; *Winger v. Sibley*, 35 Mich. 231; *Lister v. Simpson*, 35 N. J. Eq. 438; *Miller v. Shreve*, 29 N. J. L. 250; *Williams v. Winsor*, 12 R. I. 9; *Hirshkind v. Israel*, 18 So. Car. 157; *Ayers, W. & R. Co. v. Sundback (S. D.)*, 58 N. W. 4; *Hilts v. White*, 71 Hun, 511; *Black Hills Mercantile Co. v. Gardiner (S. D.)*, 58 N. W. 557; *Pool v. Gramling*, 88 Ga. 653; *Phifer v. Erwin*, 100 N. C. 59; *New v. Sailors*, 114 Ind. 407.

In the following cases such permission, whether contained in

the paper mortgage or not, was held conclusive proof of fraud : *Jacobs v. Ervin*, 9 Ore. 52 ; *Bremer v. Fleckenstein*, Ib. 266 ; *Sabin v. Columbia River Lumber & Fuel Co. (Oreg.)*, 34 Pac. 692 ; *Mann v. Reed*, 49 Ill. App. 406 ; *Eckman v. Munnerlyn*, 32 Fla. 367 ; *Simmons v. Jenkins*, 76 Ill. 479 ; *Goodhead v. Johnson*, 88 Ib. 58 ; *Greenbaum v. Wheeler*, 90 Ib. 296 ; *Dunning v. Mead*, Ib. 296 ; *Tennant Stribling Shoe Co. v. Gallant*, 53 Mo. App. 423 ; *Pensacola First Nat. Bank v. Wittich*, 33 Fla. 681 ; *Gauss v. Doyle*, 46 Ark. 122 ; *Gauss v. Orr*, Ib. 129 ; *Lund v. Fletcher*, 39 Ib. 325 ; *Ghio v. Byrnes*, 59 Ark. 280 ; *O'Neil v. Birmingham Brew. Co. (Ala.)*, 13 So. 576 ; *Wineburg v. Schaer*, 2 Wash. 328 (but see *Ephraim v. Kelleher (Wash.)*, 29 Pac. 985) ; *Gallagher v. Rosenfield*, 47 Minn. 507 ; *Brown v. Barber*, 47 Kan. 527 ; *Kennedy v. Dodson*, 44 Mo. App. 550 ; *Mandeville v. Avery*, 124 N. Y. 376 ; *Spiegelberg v. Hersh*, 3 N. Mex. 185 ; *Standard Imp. Co. v. Schultz (Kan.)*, 25 Pac. 625 ; *Rhode v. Matthais*, 35 Ill. App. 147 ; *Greeley v. Winsor (S. D.)*, 48 N. W. 485 ; *Byrd v. Forbes*, 3 Wash. Terr. 318 ; *Lewiston Nat. Bank v. Martin (Idaho)*, 23 Pac. 920 ; *Huschle v. Morris*, 131 Ill. 587 ; *Moser v. Claes*, 23 Mo. App. 420 ; *State, Kratzer v. Busch*, 38 Ib. 449 ; *Chapin v. Jenkins*, 50 Kan. 385 ; *Logan v. Logan*, 22 Fla. 561 ; *Owens v. Hobbie*, 82 Ala. 466.

Permission to, or a provision that, the mortgagor shall sell for the benefit of the mortgagee, does not avoid the mortgage : *Murray v. McNealey*, 8 O. 234 ; *Durand Organ & P. Co. v. Bowman (Oreg.)*, 35 Pac. 848 ; *Felner v. Wilson*, 55 Ark. 77 ; *Gleason v. Wilson*, 3 Wash. 48 ; *Manhattan Brass Co. v. Webster Brass & I. Co.*, 37 Mo. App. 145 ; *Nicholson v. Golden*, 27 Ib. 132 ; *Simes v. Hodge*, 121 N. Y. 671 ; *Lane v. Starr (S. D.)*, 45 N. W. 212 ; *Langert v. Brown*, 3 Wash. Terr. 102 ; *Parlin & O. Co. v. Spencer (Kan.)*, 33 Pac. 362.

The same is the case where there is an agreement that the mortgagor may sell the goods and apply the proceeds to the payment of the debt and the replenishing of the stock : *Bartlett v. Walker*, 65 Vt. 594 ; *Warren v. His Creditors*, 3 Wash. 48 ; but see *contra* *William Deering Co. v. Washburn*, 141 Ill. 153 ; *Boyd v. Forbes*, 3 Wash. Terr. 318.

A merely formal transfer of possession followed by a re-transfer to the vendor or donor, will not validate the action :

Norton v. Doolittle, 32 Conn. 405; *Hall v. Gaylor*, 37 Ib. 550; *Halstat v. Blakeslee*, 41 Ib. 301; so where there is a joint possession by vendor and vendee and nothing to render the change of the character of possession notorious: *Wordall v. Smith*, 1 Camp. 332; *Dean v. Walkenhorst*, 64 Cal. 78; *Regle v. McClure*, 17 Ib. 327; *Miller v. Garman*, 69 Pa. 134; *Garman v. Cooper*, 72 Ib. 32; *Brown v. Keller*, 43 Ib. 104; except where an exclusive possession is impossible, *e. g.*, a post-nuptial settlement by a husband upon his wife: *Larkin v. McMullin*, 39 Pa. 29.

The rule that change of possession must take place to give title as against creditors is subject to the modification that the only change of possession required is such as the property is capable of, and such as might ordinarily be expected in case of a sale of such property: *Barr v. Reitz*, 53 Pa. 256; *Boud v. Bronson*, 80 Ib. 360; *Sheldon v. Sharpless*, 2 W. N. C. 311. A manual, physical tradition is not always necessary: *Farrar v. Levison Ch. Stationery Co.*, 33 Mo. App. 246; *Vanscoy v. Bigelow*, 28 Ill. App. 301; *Pollard v. Saltonstall*, 56 Fed. Rep. 861; *Cessna v. Nimick*, 113 Pa. 70; *Stull v. Weigle*, 6 Cent. 735; *Ross v. Sedgwick*, 69 Cal. 247; *Hogan v. Cornell*, 73 Cal. 211; *Dodge v. Jones (Mont.)*, 14 Pac. 707; *Vaughn v. Owens*, 21 Ill. App. 249; *Thompson v. B. & O. R. R. Co.*, 28 Md. 396.

Deed—Delivery—Cancellation.

ROUNTREE ET AL. v. SMITH.

(Supreme Court of Illinois, October 29, 1894.)

[Reported 152 Illinois, 493.]

Giving the grantee manual possession of a deed tends to prove delivery, and, when unexplained, is sufficient to vest title, but it is not conclusive.

Delivery of a deed may be actual, by doing something and saying nothing, or verbal, by saying something and doing nothing, or it may be by both; but it must answer to the one or the other or both these, and with intent thereby to give effect to the deed.

Voluntary agreements are not enforceable in courts, even though under seal.

So long as the purpose of a grantor to make a voluntary conveyance is *in fieri*, the grantor may, with or without cause, at any time, recede from such purpose.

If such a deed is given to the grantee with the intention it shall not take effect unless security respecting certain matters is given, the gift becomes executed only upon the offering and accepting of such security.

Permission to record such a deed, if given by the grantor only, in furtherance of an ultimate purpose to make the gift provided the grantee does certain things, will not prevent the giver from withdrawing the gift at any time before the donee has performed.

Appeal from the Circuit Court of Lake county; the Hon. CLARK W. UPTON, Judge, presiding.

George Hunt, for the appellants.—In the absence of proof to the contrary, the presumption is that a deed is delivered on the day of its date: *Jayne v. Gregg*, 42 Ill. 413. And this is true although it was acknowledged afterwards: *Hardin v. Crate*, 78 Ill. 533.

Where a deed, duly executed, is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption: *Tunison v. Chamblin*, 88 Ill. 378; *McCann v. Atherton*, 106 Ib. 31.

When a deed is produced by the grantee named therein, the presumption of law, in the absence of proof to the contrary, is that the deed was signed and sealed according to its purport, and that the grantee received it from the grantor. The presumption of delivery must be destroyed by clear and positive proof, and the burden of such proof is upon the grantor: *Reed v. Douthit*, 62 Ill. 348.

A proper deed passes all title of the vendor, without regard to the consideration: *Fetrow v. Merriweather*, 53 Ill. 275. Natural affection, while not a valid consideration for an executory contract, is sufficient to support a deed: *Kirkpatrick v. Taylor*, 43 Ill. 207.

The seal imports a consideration: *Stocker v. Hewitt*, 1 Scam. 207.

As between grantor and grantee, the recital as to consideration is conclusive. The deed estops the grantor from denying its execution for the uses and purposes specified: *Kimball v. Walker*, 30 Ill. 482.

The consideration may be inquired into in any way, except to show that there is no consideration to support the deed: *Insurance Co. v. Wolf*, 37 Ill. 354.

Parol evidence is inadmissible to contradict the acknowledgment of consideration, in order to invalidate the deed between the grantor and grantee: *Trafton v. Hawes*, 102 Mass. 541; *Wilkinson v. Scott*, 17 Ib. 257; *Goodspeed v. Fuller*, 46 Me. 141; *Rockwell v. Brown*, 54 N. Y. 213.

The recital in the deed is conclusive as to the fact that there was a consideration for the deed: *Bassett v. Bassett*, 55 Me. 127; *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Ib. 542; *Murdock v. Gilchrist*, 52 N. Y. 246.

It is not necessary that the consideration be actually passed to the grantor, if the receipt of a proper consideration is acknowledged by him in the deed: *Jackson v. Alexander*, 3 Johns. 434; *Jackson v. Pike*, 9 Cow. 69; *White v. Weeks*, 1 Pa. St. 489; *Beaggy v. Geddes*, 93 Ill. 39; *Cairns v. Colburn*, 104 Mass. 274.

The amount and kind of consideration stated in the deed are presumed to be as agreed upon; and this can be varied by parol evidence in an action for recovery of consideration, but not to avoid the deed: *Drury v. Fremont*, 13 Allen, 171; *Grout v. Townsend*, 2 Denio, 335; *Rockhill v. Spraggs*, 9 Ind. 30; *Harper v. Perry*, 28 Iowa, 63; 2 Washburn on Real Prop. 658.

William E. Hughes and *T. L. Humphreville*, for the appellee.—Mrs. Smith's deeds were clearly intended to operate as a testament in favor of Mrs. Rountree and, therefore, neither one of them is good as a conveyance: *Walker v. Jones*, 23 Ala. 448; *Hall v. Bragge*, 28 Ga. 330; *Sims v. Arnold*, 10 Ib. 506; *Hester v. Young*, 2 Kelly, 31; *Carey*

v. Dennis, 13 Md. 1; *Baldwin v. Maultsby*, 26 N. C. 505; *Hawks v. Pike*, 105 Mass. 560.

The instruments in the grantee's hands are only *prima facie* evidence of a delivery. Proof of a contrary intention rebuts that presumption: *Tiedeman on Real Prop.*, § 813; *Taft v. Taft*, 59 Mich. 185; *Black v. Shreve*, 13 N. J. Eq. 336; *Roberts v. Jackson*, 1 Wend. 478.

The essence of delivery is the intention of the grantor: *Bryan v. Wash*, 2 Gilm. 557; *Gunnell v. Cockerill*, 84 Ill. 319.

To constitute a sufficient delivery of a deed there must be a clear manifestation of the intention of the grantor that the deed shall pass title at that particular time, and that the grantor shall lose all control of the title: *Bovee v. Hinde*, 135 Ill. 137.

WILKIN, C. J.—In 1885 appellee resided upon a twenty-acre tract of land, which she owned, near the city of Waukegan. Appellants (husband and wife) were teachers of elocution in Chicago. They took rooms in appellee's residence, in which they spent the month of August of that year. The summer of 1886 and 1887 they also spent at her home, she and they living as one family. About the 1st of September, 1887, Mrs. Smith made a trip to her native town, in the East, being absent several weeks. She spent the winter with appellants, at their rooms in Chicago; and thereafter, to and including the summer of 1891, she lived with them in the city during the winter months, and they at her home in the summer, the family relations at both places being continued. Appellee is a widow about sixty-eight years of age, without children or other near relations. She owned, in addition to the twenty-acre homestead, two tracts of land in Lake county—one of thirty acres, and the other of forty-one and a fraction—and certain lots, and a small tract of land in Cook county, near Englewood, all of which she valued at \$100,000. The parties apparently became warm

friends during the summer of 1885, and that relation continued until the latter part of the year of 1891. Before making her visit East, in the fall of 1887, appellee formed the purpose of giving Mrs. Rountree the homestead and thirty-acre tract, the deeds to take effect at her death; and to that end she executed and acknowledged two deeds, one for each of the tracts, which she placed in an envelope, sealing it up, and writing on it the words: "To be opened at my death," and placing it in her private secretary. Subsequently, she concluded to enlarge the gift, and include in it the whole of her real estate, and of date February 14, 1891, she executed four deeds, one conveying to Mrs. Rountree the Englewood property; and each of the others, one of the Lake county tracts. These she gave to Mrs. Rountree soon after they were made, but, as she says, not with the intention of then passing the title. She afterwards, about October 22, 1891, consented to the recording of the one to the homestead, but not intending thereby to make it absolute. The other deeds remained in the hands of Mrs. Rountree, unrecorded, until about the 13th of November, 1891, during which time the parties were negotiating as to the security to be given Mrs. Smith. Mrs. Rountree then, in the presence of appellee, gave them, with the one conveying the homestead, and, as she says, the two executed in 1887, to Erastus C. Moderwell, an attorney. Shortly thereafter appellee became displeased with appellants; and her former friendship, especially for Mrs. Rountree, wholly ceased. She then demanded the return and cancellation of her deeds. This request Mrs. Rountree refused to comply with, but withdrew them from the hands of Moderwell, and in April, 1892, caused them to be placed on record. Thereupon, appellee filed this bill in the Circuit Court of Lake county, and afterwards an amended bill asking that each of said deeds, with the records thereof, be set aside and canceled. The Circuit Court granted the prayer of her bill, and appellants appeal.

The theory of complainant's case is that the deeds of 1891 were voluntary conveyances, made by her with the agreement between herself and Mrs. Rountree, the grantee, that she and her husband would execute and deliver back to her notes equal in amount to the value of the lands conveyed, secured by mortgages or deeds of trust upon the premises, it being understood between the parties that she would so manage the securities that at her death the grantee would become the absolute owner of the property, free from all incumbrance; that some time after their execution she gave them to Mrs. Rountree, but with the agreement on her part that they were not to be recorded, and remain subject to her control, she to continue to have control of the property, and the right to sell and convey any part of it, and receive the purchase-money, in which event the securities would to that extent be destroyed; that she subsequently gave to Mrs. Rountree permission to have the deed to the homestead recorded, but not for the purpose of giving effect to it, except as previously agreed upon. In short, her contention is that the deeds were intended to become absolute only upon her death, and that they were executed and delivered, and the one recorded, upon that agreement, and with the understanding that the conveyances were not to take effect, or be treated as absolute, until security should be given her as above stated, which Mrs. Rountree and her husband afterwards refused to give, at least until after she had determined not to perfect the conveyances, and so informed them, demanding the return and cancellation of her deeds. As to the deeds of 1887, she alleges in her amended bill that they were not intended to be delivered until her death, and never were in fact delivered by her in any manner. The theory of the defense is that the deeds of 1891 were voluntarily executed, acknowledged and delivered on the day of their date, without any understanding between the parties then or previously, that they were not to become at once absolute; that they were made without their

knowledge or procurement, and were wholly voluntary on the part of appellee; that any understanding between the parties as to the giving security, for any purpose, was an afterthought on the part of Mrs. Smith, and arose after the complete execution and unconditional delivery of the deeds. Therefore, they say, without proof, not only of an agreement on their part to do something in consideration of the conveyances, but also a breach of that contract, complainant has no right to have them set aside and declared void. They claim that the deeds of 1887 were, long after the execution and delivery of those of 1891, given to Mrs. Rountree by Mrs. Smith, as additional proof of her voluntary purpose to give her all the real property she owned.

That the deeds were voluntary on the part of appellee—intended as mere gifts to Mrs. Rountree—is not denied. While the latter claims to have performed many acts of kindness towards Mrs. Smith, and rendered her valuable services from time to time, both before and after the deeds were executed, and did no doubt in that way win the friendship and affection which prompted the gift, it is not claimed that any such services entered into the consideration for the deeds, in the sense of a contract. Mrs. Rountree's own testimony is to the effect that the conveyances were intended as gifts to her, and that no contractual relation existed between herself and Mrs. Smith at any time, under which she could have compelled them. The testimony of appellee is positive and full to the effect that, both before and after the deeds of 1891 were transferred to Mrs. Rountree, it was at all times agreed and understood that they were to take effect only upon the execution and delivery back to her of notes secured by mortgages, etc. In other words, her testimony fully supports the theory of her bill, as stated above, and in that testimony she is corroborated by John S. Collman, who took her acknowledgment to the deeds; Mrs. Broadway and Mrs. Lucy A. Prosser, who testified to a conversation between the parties at the house of Mrs. Broadway, February

26, 1891—the deed being taken there by them, but whether they had then been given to Mrs. Rountree is in dispute. The testimony of these four witnesses strongly supports the theory that whatever delivery of the deeds was made was upon the condition that they would take effect upon the return of securities to Mrs. Smith. The evidence of appellants is to the effect that they were unconditionally delivered on the day of their date, February 14, but they admit that very soon after they were so delivered (at least as early as February 26) at Mrs. Broadway's, it was agreed that Mrs. Smith should have some security to protect her in the right to control the property. Speaking of the conversation at that time, Mrs. Rountree says: "I was willing—I used this expression: 'Anything any good lawyer would suggest I would only be too happy to carry out;' that it ought to be done." To the question, "Now, what were those securities to be for?" she answered: "In the event of my death first, for Mrs. Smith, that she might not be dependent upon my heirs, or professor's heirs; so that she could get her property back in case I died first." She also admits that it was understood the deeds were not to be recorded, and that the one for the twenty acres was recorded October 22, 1891, by the express consent of Mrs. Smith, because of a difficulty in regard to a ditch which other parties had dug on the land. Her language is, "she said I might put the deed on record." She also says, in answer to a question as to whether anything was said between herself and Mrs. Smith after February 14, 1891, about selling any of the property: "We had agreed to sell the thirty, the proceeds first to pay Mrs. Smith's debts; second, for the benefit of the family, professor, Mrs. Smith and myself. Mrs. Smith considered first; her pleasure to be thought of first. If that wasn't enough to give her all the fun she wanted, the forty was to be sold. The twenty was to be mine absolutely."

It appears that on the 13th of November, 1891, the parties (Mrs. Smith and Mrs. Rountree), by appointment, met one

Erastus C. Moderwell, a lawyer and his brother, John B. Moderwell, a real estate agent, at the homestead ; and it is insisted by appellants that by her own admissions, as shown by the Moderwells, Mrs. Smith had unconditionally parted with her title to the lands in question on the 14th of February, 1891. These witnesses do, in the first part of their testimony, convey the idea that Mrs. Smith not only admitted she had required no security whatever from Mrs. Rountree, but that she had never contemplated so doing. That part of their testimony is to the effect that the question of any sort of securities to protect Mrs. Smith was first suggested by Erastus C. Moderwell at that time. When, however, their entire evidence is considered, it clearly shows that the subject had been under discussion between the parties from time to time before then, and different kinds of security suggested and talked of. That seems to have been the last friendly meeting of the two ladies, and we regard what took place between them touching the conveyance, of the first importance in determining their right in the case. Erastus C. Moderwell testified that, after he had insisted that Mrs. Smith should be protected by some agreement in writing, Mrs. Smith said : “ ‘ Well, we did talk once of the trust deed, but Mr. Rountree said he didn't wish to sign a cutthroat mortgage. So I dropped that. Then,’ she said, ‘ I asked them to give me a quit-claim deed ; but Mrs. Rountree wanted to consult an attorney, and he told her that it would nullify the deed to make a quit-claim back. So we dropped that. I then suggested that she make a will, willing me her property back in case she should die. All the security that I wanted was, in case Mrs. Rountree should die before I did, as she is running back and forth on the trains, and may be killed at any time. If she should die all this property would go to her heirs and I would be left without nothing, but she has promised to make a will.’ I said, ‘ Mrs. Smith, a will would be better than nothing, but let me say to you that a will is no security. A person may

make a will to-day and to-morrow they may make a different will.' Then Mrs. Rountree spoke up and says, 'Major Moderwell, I am willing to make any kind of security which you say is right and proper.' I said, 'For the interest of both of you, you ought to make some sort of security.' Mrs. Smith then said, 'Major Moderwell, I want you to examine the abstracts of all of my property. Look them over carefully and see that everything is straight.' She handed me a bunch of abstracts and said: 'Here they are all, except the abstract of the home, "20." That is not completed yet. There are two affidavits concerning whether certain parties were married when they made the deed. I have sent for those affidavits and expect them in a few days. When I get those affidavits I will have the abstract completed and will take it down to your office; and in the meantime I will study over this matter and determine what kind of securities we ought to have.' And I said, 'You certainly ought to.' I said: 'If I were in your place I would have a written contract setting forth what Mrs. Rountree is to do for you. I would have it put on record, or better than that, I think, would be for Mrs. Rountree to convey all this real estate to a trustee by a trust deed, and this trust deed should set forth fully all that they are to do for you. That would be the best way.' Then Mrs. Smith said, 'Well, we will make up our minds. We will let you know soon.' Then I said: 'Now, what is the agreement between you parties? What have you agreed to?' Mrs. Smith said: 'The agreement is that Mrs. Rountree is to have this homestead free and clear of all incumbrances. The thirty-acre tract shall be sold, and the money shall be used to pay my debts. After that, what is left shall be kept for the support of the family. And it is understood that I am to have whatever I wish. I am to have the best of clothes—silk and satin, if I desire it. I am to be kept like a lady, and whatever luxuries I ask for I am to have.' Mrs. Rountree says: 'Yes, she is to be kept like a lady. That is our agreement. If it takes all the

money, then we are next to sell the forty acres, and use it in the same way.' Then I said, 'What about the Englewood lots?' Mrs. Smith said: 'Mrs. Rountree and I have an understanding about them. She has agreed to do with them as I direct, and I am willing to trust her to carry it out.' The testimony of his brother, John B., is to the same effect. Both these witnesses, as well as Mrs. Rountree, testified that, early in the interview, Mrs. Smith delivered to Mrs. Rountree the two deeds of 1887; stating, in substance, that Mrs. Rountree was ignorant of their existence, and she then gave them to her as evidence that she had been uninfluenced in the purpose to give her all the property. They do not agree as to the language she used, but, as given by each of them, it shows that those deeds were produced and handed to Mrs. Rountree, not for the purpose of making a double conveyance of the property described in them, but as evidence of her entire freedom from restraint or influence in making the deeds in 1891. It is also admitted by all parties that they were handed to her before final directions were given Major Moderwell in regard to security, as shown by his testimony above, and were, therefore, if delivered at all, subject to the same conditions and instructions given as to those of 1891. Not long after the meeting of November 13, Mrs. Smith became dissatisfied with the arrangement and refused to proceed with the business, demanding the return of the deeds.

We think it clear from the evidence in this record—even that produced by the defendants themselves—that it was never the intention of Mrs. Smith, or even of Mrs. Rountree, that the deeds in question should absolutely divest the former of the title to and control over her property, and unconditionally transfer it to the latter; also, that it was well understood between the parties at the time the deeds were given to the grantee, and consent given that the one might be recorded, that they were not thereby to be given effect, but that the title should remain subject to the control of the

grantor. The fact that the deeds had been given to the grantee is a circumstance tending to prove delivery, and, unexplained, would be sufficient to vest the title in her, but it is not conclusive. "In undertaking to define what will constitute a delivery of a deed, it is said that it may be actual—that is, by doing something and saying nothing—or it may be by both. But it must be by something answering to the one or the other or both these, and with an intent thereby to give effect to the deed." 3 Washb. Real Prop. 286, and cases cited in note 1; 1 Devl. Deeds, 262, and cases cited; Byars v. Spencer, 101 Ill. 429; Blake v. Fash, 44 Ill. 302; Whitman v. Heneberry, 73 Ill. 109. From all the testimony the conclusion is irresistible that, up to and including the final directions to Moderwell, the purpose of Mrs. Smith to make a conveyance of her property to Mrs. Rountree was *in fieri*. That being true, Mrs. Smith had a clear legal right, with or without cause, to recede from her purpose at any time. That is to say, voluntary agreements are not enforceable in the courts, even though under seal: Fry, Spec. Perf. 64; 1 Story, Eq. Jur., § 433. If, after the deeds in question were executed and acknowledged, appellee had refused to deliver them, Mrs. Rountree would have been powerless to compel her. If she had tendered all the security asked—offered to perform any condition prescribed—still she would have had no standing in a court, either of law or equity, to compel a delivery of the deeds. Appellee might lawfully say at any time before the completion of the gift: "I have changed my mind, and will do with my own as I choose." On the same principle, even though the deeds were given to Mrs. Rountree, and she allowed to place one of them on record, that being done merely in furtherance of an ultimate purpose to make the gift provided certain things were done by the donee, the giver might still withdraw the gift at any time before the performance on the part of the donee. In other words, if the deeds were given to Mrs. Rountree with the

understanding and intention that they were not to take effect unless Mrs. Smith was made secure in the right to control the property while she lived, then the gift would only become executed upon the offering and accepting such security ; and, until that was done, appellee had the right to refuse to go on with the gift, and insist upon the return of her deeds, even though Mrs. Rountree might have then been willing to give such security. Under the issues and evidence in this case, the rights of the parties stood on the 13th of November, 1891, precisely as though Mrs. Smith had never parted with the manual control of either of the five deeds. Accepting as true the testimony of the Moderwells and of Mrs. Rountree herself, the final directions were then given by which the gift was to be consummated. Suppose the agreement then was just as Major Moderwell states it. Can it be questioned that Mrs. Smith had a clear right to refuse to perform that agreement? This she did, and demanded a return of her deeds. The placing them on record after that, and asserting title under them, by Mrs. Rountree, was wrongful. It will, we think, be conceded that if Mrs. Rountree had, on the allegations of her answer, and the testimony introduced on her behalf, asked a court of equity to enforce the agreement or understanding testified to by the Moderwells, she would have been successively met by the answer : " Courts do not enforce voluntary agreements." That which gave Mrs. Smith a standing in the court below was not a right to relief against her own voluntary act, but the recording of the deeds by Mrs. Rountree, and setting up a claim of title to the property under them, after a demand upon her for their return, thereby creating a cloud upon the title. The decree of the Circuit Court is in harmony with the law and evidence of this case, as we understand it, and will be affirmed.

Affirmed.

Presumptively any manual tradition by a grantor to a grantee constitutes a delivery of the deed handed over, and it is held in some cases that there cannot be a delivery to the grantee himself subject to conditions which do not appear upon the face of the instrument—in other words, that the grantee cannot be constituted a holder in escrow, but in such case the deed will become absolute: *Arnold v. Patrick*, 6 Paige Ch. 310; *McCann v. Atherton*, 106 Ill. 35; *Fairbanks v. Metcalf*, 8 Mass. 230; *Seymour v. Corning*, 1 Keyes, 535; *Worrall v. Munn*, 5 N. Y. 229; *Wallace v. Berdell*, 97 N. Y. 25; but there are cases which modify the above rule. Of course, when there is a mere obtaining of possession of the deed without any consent thereto by the grantor, there is no delivery: *Haskell v. Doty*, 78 Cal. 273; *Felix v. Patrick*, 145 U. S. 317; so when the deed is handed to the grantee with the intent that it shall be handed to a third person to hold in escrow: *Cherry v. Herring*, 83 Ala. 458; so when the possession is obtained by fraud: *Ritter v. Worth*, 58 N. Y. 627; *Van Amringe v. Morton*, 4 Whart. 382; but there remains the case in which there has been neither fraud nor force used in obtaining the actual possession of the deed, but the fraud is in the use afterwards made of it—in such case the question of delivery becomes important. There are authorities which hold that to constitute a delivery of a deed there must be a clear manifestation of the intention of the grantor to give up control of it and that it shall at once become operative to pass the title: *Vreeland v. Vreeland*, 47 N. J. Eq. 56; *Bonee v. Hinde*, 135 Ill. 137; *Hayes v. Boylan* (Ill.), 30 N. E. 104; *Provart v. Harris*, 150 Ill. 40; as where a deed is handed to a grantee, between whom and the grantor an agreement for exchange exists, to be kept until the title is examined: *Chick v. Sisson*, 95 Mich. 412; or where there is manual tradition with the understanding that the grantor is to receive in return a warrant deed for other property, where the grantor immediately on discovering that the deed given him is defective demands the return of the deed he had parted with: *McDonald v. Minnick*, 147 Ill. 651; and see *Lee v. Richmond* (Iowa), 57 N. W. 613. On the other hand, some cases may be found in which a manual tradition has been given effect against the wishes and intent of the parties; thus in

Richmond v. Moford (Wash.), 30 Pac. 241, it was held that handing over a deed with the agreement that it should be kept by the grantee until a purchase-money mortgage was executed was a delivery which vested an absolute title in the grantee, and in *Darling v. Butler*, 45 Fed. Rep. 332, that a deed delivered to the grantee on an agreement to return it, or, if it should be recorded, to reconvey the land upon certain conditions, conveyed the legal title although the parties supposed that it did not.

A deed which is a cloud upon title or which has been obtained by fraud may be canceled in equity: *Jones v. Jones*, 130 N. Y. 589; *Schœner v. Lissauer*, 107 Ib. 111; *Pulsifer v. Paddock*, 43 Kan. 718; *Pinger v. Pinger*, 40 Minn. 417; *Kelly v. Smith*, 73 Wisc. 191; *Chaney v. Coleman*, 77 Tex. 100; *Crabtree v. Bradbury*, 56 Ark.; *Brown v. Krause*, 132 Ill. 177; *Atkinson v. Sinnott*, 67 Miss. 502; *Delorac v. Connor*, 29 Neb. 791; *Frizzell v. Read*, 77 Ga. 724; *Carbine v. McCoy*, 85 Ga. 185; *Crouse v. Lewin*, 95 N. Y. 423; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Allore v. Jewell*, 94 U. S. 506; *Bishop v. Aldrich*, 48 Wisc. 619; *Mattais v. Payne*, 15 Fla. 682; *Seymour v. Belding*, 83 Ill. 222; *Stone v. Wilbern*, Ib. 105; *Pickrell v. Morss*, 97 Ib. 120; *Walton v. Tusten*, 49 Miss. 569; *Morrison v. Morrison*, 37 Gratt. 190; *Billings v. Mann*, 156 Mass. 203; *Hurd v. Turner*, Ib. 1137; 2 Beach Mod. Eq., § 551.

Creditors' bill—Delivery and acceptance—Disclaimer—Registration.

GUGGENHEIMER ET AL. *v.* LOCKRIDGE ET AL.

(Supreme Court of Appeals of West Virginia, June 11, 1894.)

Under § 2, c. 133, Code, a creditor, before obtaining judgment, may sue in equity to avoid a fraudulent transfer of his debtor's property, and, if successful, has a lien from the commencement of his suit.

After a grantee in a fraudulent conveyance has reconveyed the property to the debtor (grantor), equity has no jurisdiction of a suit by a creditor to subject the property, in advance of lien by judgment or otherwise, merely because of such fraudulent conveyance.

A deed must not only be delivered by the grantor, but must be accepted by the grantee. Acceptance may be express, by signing the deed or otherwise, or may be implied from circumstances. The assent of the grantee will be presumed where the deed is beneficial to him, until dissent appear. Where dissent or disclaimer appears, the deed is inoperative, and the title to the thing granted reverts to the grantor by reverter from such disclaimer.

Where such a fraudulent deed is made, but is disclaimed by the grantee, equity has no jurisdiction of a suit brought after such disclaimer by a creditor of the grantor to subject the property to debt, in advance of judgment, merely because of such deed.

A deed is good between the parties without registry, as registry is only to protect subsequent purchasers from the grantor for valuable consideration, without notice, and creditors; and therefore the registry of a deed, without the knowledge or consent of the grantee, will not bar him from disclaiming it.

A transfer from one joint debtor to another will not give equity jurisdiction to entertain a suit by that creditor of the grantor, in advance of lien by judgment or otherwise, to subject the property to his debt.

Appeal from Circuit Court, Pocahontas county.

Bill in chancery by Guggenheimer & Co. against H. M. Lockridge and others. On demurrer suit was dismissed, and complainants appealed. Affirmed.

H. S. Rucker, for appellants.

L. M. McClintic, for appellee Lockridge.

W. M. & J. T. McAllister, for appellee First Nat. Bank of Buena Vista.

BRANNON, P.—This suit in chancery was in the Circuit Court of Pocahontas county by Guggenheimer & Co. against Lockridge and others. Upon demurrer the suit was dismissed, and Guggenheimer & Co. appeal. The question at the threshold of the case is, has equity jurisdiction of the suit upon the case as made by the bill? The original bill sets up a joint and several debt by notes in favor of Guggenheimer & Co. against H. M. Lockridge and J. B. Lockridge, and seeks to avoid, as fraudulent, conveyances of land—one made by J. B. Lockridge to Ernest N. Moore, for

one tract of land, and one from H. M. Lockridge to J. B. Lockridge, for another tract. The plaintiffs are only general creditors of the two Lockridges, by note, and had no lien, but claim the right, as such general creditors, before obtaining judgment at law, to sue in chancery to avoid fraudulent conveyances, by authority of § 2, c. 133, of the Code, authorizing a creditor, before obtaining judgment, to institute any suit to avoid a fraudulent transfer of, or charge upon, the estate of his debtor, which he could institute after judgment. Before the enactment of that statute, such general creditor, having no lien, could not go into equity to enforce his debt by assailing a fraudulent conveyance: *Kelso v. Blackburn*, 3 Leigh, 299; *Bump, Fraud. Conv.* 521; *Guano Co. v. Heatherly*, 38 W. Va. 415. But under said statute he can do so, and, if successful in overthrowing the fraudulent conveyance, he has a lien from the commencement of his suit: *Clark v. Figgins*, 31 W. Va. 156; *Sweeney v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431; *Norris v. Lemen*, 28 W. Va. 336; *Wallace v. Treacle*, 27 Grat. 479. But do the statements of the bill bring the case under the statute? Indeed, do they not show that equity jurisdiction cannot be sustained under it? Take the case made by the bill as it relates to the tract of land conveyed by J. B. Lockridge to Ernest N. Moore. While the bill states that Lockridge executed a deed for it to Moore with fraudulent intent, yet it distinctly states that in executing the deed it was impossible that Lockridge could have communicated with Moore; that Moore did not seek to buy the land at any price, and did not pay \$8,000 cash, or any sum, but that Lockridge made the deed to Moore without consulting him, and Moore knew nothing of it until after the deed had been executed and recorded at the instance of the grantor, and that on learning of it he repudiated the deed, and denied any interest under it; that Lockridge and Moore met, and both agreed and admitted such facts to be true, and agreed that the land should be re-

conveyed by Moore to Lockridge; and that Moore had executed a deed conveying the land back to Lockridge, but Lockridge failed to put it on record, with intent to hinder and defraud creditors. An amended bill states the execution of this deed reconveying the tract from Moore to Lockridge, and exhibits it, and it appears to have been made prior to the institution of this suit. It appears from the showing of the plaintiffs that while Lockridge, so far as his mere act could do so, had made a fraudulent transfer to Moore, the land had reverted in the debtor, Lockridge, by reconveyance. That fact does away with any call for equity which entertains a suit to avoid fraudulent conveyances only because the fraudulent conveyance has removed the estate out of the reach of ordinary remedial process against the debtor, by divesting him of it, so that a judgment at law against the debtor would not operate as a lien, and vesting it in another; and it is to brush away such conveyance, and restore the land to the debtor, so far as the creditor is concerned, that equity assumes jurisdiction. Where the parties have repented, and done, themselves, the act of reconveyance, where is the call for equity intervention? It is again within the reach of the usual remedial procedure, as though the fraudulent conveyance had never had existence.

There is a second reason for denying equity jurisdiction. The bill states that Moore did not assent to or ratify the deed, but repudiated it on learning of it. Did an estate in the land vest in Moore? If it did not, where is the reason for equity jurisdiction, the estate remaining in the grantor? Is acceptance by a grantee of the deed a part and parcel of the act of delivery? On all hands we find agreement that delivery of a deed is an indispensable element in its execution. Is acceptance by the grantee strictly a part of the act of delivery? Some so consider it, on the principle that there can be no completed delivery without the participation of the grantee—a hand to receive as well as one to

give; and, if this be not so, then the elementary writers, in giving the essential parts of a deed, are defective in omitting to give acceptance a distinct and separate elemental place in the definition of a deed; for, on all sides, it is granted that acceptance by the grantee is necessary: 2 Minor, Inst. 656; opinion in *Skipwith v. Cunningham*, 8 Leigh, 282; *Younge v. Guilbeau*, 3 Wall. 636; 5 Am. & Eng. Enc. Law, 446; 5 Wait, Act. & Def. 3814. On authority, we may properly say that acceptance is not a part of delivery, but that delivery makes the deed good against the grantor, vesting the estate in the grantee; but such delivery may be avoided by the disclaimer or disavowal of the deed by the grantee, and thereupon the delivery is avoided, and the estate reverts in the grantor by remitter: *Thompson v. Leach*, 2 Vent. 198; 4 Kent, Comm. 455, note c; *Skipwith v. Cunningham*, 8 Leigh, 272, 282; 2 Lomax, Dig. 26, 287; 2 Minor, Inst. 656; 2 Bl. Comm. 309. While acceptance is necessary it need not be expressed, as it may be implied, and it will be implied from many circumstances. We must not understand that acceptance of a deed is to be expressly or affirmatively shown. The establishment of such a rule would shake innumerable titles. The language of the books is that acceptance of a deed is necessary to its operation. Perhaps it would be better to say that dissent by the grantee must be shown, for it is not stating the law too broadly to say that in all conveyances beneficial to the grantee the assent of the grantee is presumed until his dissent be shown, and this because it is for his benefit, and it is not likely one will disclaim a benefit; and also it is unreasonable that when the grantor has made a deed the estate should still remain in him, and also it is to prevent uncertainty as to where the freehold is: *Skipwith v. Cunningham*, 8 Leigh, 272, 281, 285; *Guano Co. v. Heatherly*, 38 W. Va. 410, point 8, 18 S. E. 611; 2 Greenl. Ev. 297; 2 Bl. Comm. 309; *Halluck v. Bush*, 1 Am. Dec. 60; *Peavey v. Tilton*, 45 Am. Dec. 365; *Lady*

Superior v. McNamara, 49 Am. Dec. 184; 5 Wait, Act. & Def. 3814. As to delivery of deed, see *Lang v. Smith*, 37 W. Va. 725; *Newlin v. Beard*, 6 W. Va. 110.

The dissent and disclaimer of the deed by Moore avoided the deed, so that when this suit was brought to avoid that deed it had been already avoided. There was no title in Moore, but it had revested in Lockridge, and a judgment at law against Lockridge would have been a lien upon it. Equity jurisdiction under that execution depends on a consummated fraudulent transfer, operating to vest title in the grantee at the institution of the suit. The facts stated by the bill show that, in law, title was in Lockridge—not in Moore. It might seem that the very fact that Moore conveyed the land back to Lockridge would evidence Moore's acceptance of the deed from Lockridge to him. Taken alone, ordinarily, it would, but not so under the statements of the bill. It states that at once, on learning of the deed, he repudiated it. That utterly avoided the deed, and remitted the title to Lockridge; and I do not see how an after-acceptance could revive the dead deed, and give it operation, even if he had later accepted it. But the bill definitely states that Lockridge and Moore met, and Moore and Lockridge agreed that Moore had not accepted, but had dissented, and that they agreed that the land was to be reconveyed. The reconveyance was not to be made because Moore had accepted the deed to him, but because he had dissented, and declined to accept, in the same breath in which he agreed to reconvey, as also, before, he refused to accept and disowned the deed. It was only to avoid all questions as to title that it was to be reconveyed.

The deed was on record, and, as the disclaimer of it already made depended on oral evidence, it was a prudent precaution to have a reconveyance on record; but the recordation was simply Lockridge's act, not Moore's, and was not an acceptance, and did not have the slightest effect to prevent Moore from disclaiming: *Maynard v. Maynard*, 10

Mass. 456 ; 4 Kent, Comm. 455, in note c. It was still subject to grantee's rejection : 2 Minor, Inst., bottom page 657. The recordation of a deed does not impart any force or validity to it. On the contrary, it presupposes an already perfect deed. Its only effect is, not to operate as between the parties (as a deed not recorded is just as binding on them as if recorded), but it is to give notice to those who may afterwards, for value, and without notice of the deed, purchase the land of the grantor, and to creditors : 2 Minor, Inst. 871 ; *McCandlish v. Keen*, 13 Grat. 632.

Now, as to the deed from H. M. Lockridge to J. B. Lockridge for the 325-acre tract. This alleged fraudulent conveyance was from one joint debtor to another. In the hands of either it would be liable to the lien of a judgment. The deed did not remove it out of the reach of the usual remedy. No reason appears to show why it could not as readily be subjected in the hands of one debtor as the other, or why this conveyance would hinder, delay or defraud a creditor. The mere statement in the bill that the conveyance was from one joint debtor to the other would seem to repel any imputation of fraudulent intent, and make the bill demurrable. So there is no ground for chancery jurisdiction as to this conveyance. So I am of the opinion that the bill states itself out of court. For want of jurisdiction in equity we must affirm the decree of the Circuit Court dismissing the case, without prejudice to another suit. There being no jurisdiction, under the practice of the court, we will not consider the question of multifariousness.

HOLT, J., not sitting.

A deed has no effect until delivered by the grantor and accepted by the grantee. Delivery is necessary : *Goddard's Case*, 2 Rep. 4 b ; *Shoenberger's Exrs. v. Zook*, 34 Pa. 24 ; *Jackson v. Leek*, 12 Wend. 107 ; *Jackson v. Phipps*, 12 Johns. 421 ; *Fisher v. Hall*, 41 N. Y. 423 ; *Fay v. Richardson*, 7 Pick. 91 ; *Woodbury v. Fisher*, 20 Ind. 388 ; *Lang v. Smith*, 67 W. Va. 725.

Acceptance is equally essential, and when not proved and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass: 5 Am. & Eng. Encl. of Law, 446; *Rogers v. Cary*, 47 Mo. 232; *Younge v. Guilbeau*, 3 Wall. 636; *Parmlee v. Simpson*, 5 Ib. 86; *Tompkins v. Wheeler*, 16 Pet. 119; *Wilsey v. Dennis*, 44 Barb. 359; *Fonda v. Sage*, 46 Ib. 123; *Hatch v. Bates*, 54 Me. 140; *Maynard v. Maynard*, 10 Mass. 456; *Baker v. Haskell*, 47 N. H. 479; *Derry Bank v. Webster*, 44 Ib. 264; *Johnson v. Farley*, 45 Ib. 505; *Mitchell v. Ryan*, 3 Oh. St. 377; *Kingsbury v. Burnside*, 58 Ill. 310; *Ward v. Winslow*, 4 Pick. 518; *Stewart v. Redditt*, 3 Md. 67; *Comer v. Baldwin*, 16 Minn. 172; *Elmar v. Marks*, 39 Vt. 538; *Jackson v. Cleveland*, 15 Mich. 101; *Day v. Griffith*, 15 Iowa, 103; *Cole v. Gill*, 14 Ib. 529; *Read v. Robinson*, 6 W. & S. 329; *Xenos v. Wickham*, 14 C. B. (N. S.) 474; *Wells v. Sackett*, 12 Wisc. 243; *Moore v. Flynn*, 135 Ill. 74; *Merrill v. Swift*, 18 Conn. 261; *Corbett v. Norcross*, 35 N. H. 99; *Felix v. Patrick*, 145 U. S. 317; *Black v. Hoyt*, 33 Oh. St. 203; *Floyd v. Giddings*, 7 Oh. St. 53; *Kearney v. Jeffries*, 48 Miss. 343.

Acceptance may be inferred. The finding of a deed in the grantee's possession is strong evidence of acceptance: *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Ward v. Lewis*, 4 Pick. 518. Acceptance in some cases may be presumed where there has been a delivery to and reception by a third person, between whom and the grantee a confidential relation exists, as that of husband and wife, parent and infant child: *Melvin v. Prop's*, 16 Pick. 167; *Foley v. Howard*, 8 Clarke (Iowa), 36; *Baker v. Haskell*, 47 N. H. 479; *Sonnerbye v. Arden*, 1 Johns. Ch. 255; *Jaques v. Methodist Church*, 17 Johns. 577; *Gregory v. Wash*, 6 Ill. 557; *Morrison v. Kelly*, 22 Ill. 612; *Rogers v. Carey*, 47 Mo. 236; *Cloud v. Calhoun*, 10 Rich. Eq. 362.

An acceptance may be presumed when a deed is executed and placed upon record without any manual tradition to the grantee, where he is aware of the deed, and it is beneficial to him, and he does not disavow taking under it: *Robinson v. Gould*, 26 Iowa, 93; *Cecil v. Beaver*, 28 Ib. 241; *Printard v. Bodle*, 20 Johns. 184; *Ten Eyck v. Richards*, 6 Cow. 617; but no such presumption can arise when the deed is not beneficial to the grantee: *Gifford v. Corrigan*, 105 N. Y. 223; or

where he is to take subject to a duty or the performance of a trust: *Printard v. Bodle*; *Ten Eyck v. Richards*, *supra*; in such cases there must be an express acceptance: *Fonda v. Sage*, 46 Barb. 109; *Carnes v. Platt*, 6 Robt. 270; *Stephens v. Buffalo & N. Y. City Ry. Co.*, 20 Barb. 332; no such presumption will arise when the grantee is ignorant of the deed: *Maynard v. Maynard*, *supra*; *Prestman v. Baker*, 30 Wisc. 644; *Baker v. Haskell*, *supra*; *Thompson v. Lloyd*, 49 Pa. 128; *Cravens v. Rossiter (Mo.)*, 22 S. W. 736; *Samson v. Thornton*, 3 Metc. 275; or where circumstances show that no presumption can arise from the mere recording with knowledge of the grantee, as where the deed is delivered to the grantee's agent to be held while his principal considered the question of acceptance and the agent records it: *Ford v. James*, 4 Keyes, 300, 2 Abb. Dec. 159; *Carnes v. Platt*, *supra*; but the presumption arising from the relation of a third person and the grantee may cause an acceptance, even in a case in which the grantee is ignorant of the existence of the deed, thus in *Crain v. Wright*, 114 N. Y. 307, where a deed was delivered by the grantor to the grantee's husband with a request that it should be kept secret during the grantor's life and the grantee had heard the grantor say, a short time before making the deed, that he intended to make one, it was held that there was a sufficient acceptance. The case of *Deere v. Norton*, 73 Iowa, 186, departs from the rule above stated, holding that the filing of a deed for record cannot be considered even as delivery unless in pursuance of a prior agreement. An assent subsequent to the record of a deed by a grantee, who was ignorant of the deed at the time of its filing is a good acceptance: *Farmers' & Mechanics' Bank v. Drury*, 38 Vt. 426; *Lee v. Fletcher*, 46 Minn. 49. A disavowance of the deed by the grantee will, unless he has estopped himself by acting under the deed, prevent any title from passing to him under it: *Townson v. Tickell*, 3 B. & Ald. 36; *Younge v. Guilbeau*, *supra*; *Tompkins v. Wheeler*, 16 Pet. 119; *Read v. Robinson*, *supra*; *Rogers v. Casey*, 47 Mo. 232; *Dikes v. Miller*, 24 Tex. 423; *Day v. Mooney*, 4 Hun, 134.

Specific performance—Continuous act—Change of conditions.

**PROSPECT PARK & CONEY ISLAND RAILROAD CO.
v. CONEY ISLAND & BROOKLYN RAILROAD CO.**

(Court of Appeals of New York, December 11, 1894.)

Plaintiff and defendant companies owned competing street railroads in the city of Brooklyn, extending to Coney Island. Plaintiff's line from C. depot, at N. avenue and Twentieth street, was a steam railroad. All the other lines were horse railroads. The companies agreed, in 1882, that defendant should run cars for twenty-one years over plaintiff's track from defendant's road at N. avenue and Fifteenth street to C. depot, and that, if defendant should use "steam as a motive power" from N. avenue and Fifteenth street to Coney Island, either party could terminate the contract. Subsequently, the defendant established an electric railway line over the route named and refused to run cars over the line of the plaintiff, which brought an action to compel specific performance of the contract of 1882. *Held*, that the words "steam as a motive power" did not mean rapid transit, by whatever means accomplished, so as to entitle defendant to terminate the contract on the use by it of electricity as a motive power on its road from N. avenue and Fifteenth street to Coney Island, or disentitle plaintiff to specific performance. **ANDREWS, C. J.**, dissenting: 21 N. Y. Supp. 1046, reversed.

When such contract was made, plaintiff owned certain franchises for horse railroads, which, if constructed, would compete with defendant's roads, and some of which the defendant had endeavored to purchase from the plaintiff. Three years afterwards plaintiff leased such franchises, and, two years thereafter, sold them to the A. Company, which constructed a road from C. depot to H. ferry, which competed with defendant's road, and injured its business. Defendant did not object to such transfer until after its refusal to perform its contract with plaintiff, four years after the sale. *Held*, That such transfer by plaintiff did not render it inequitable to enforce specific performance of its contract with defendant.

The contract did not impliedly prohibit plaintiff from selling such franchises to a purchaser who would not have the same motive to deal fairly with defendant that plaintiff had while seeking to build up its Coney Island business.

A failure on the part of plaintiff and its grantee to substantially perform the provisions of the contract in regard to defendant's terminal facilities at C. depot, would not be a defense to an action for specific per-

formance, since defendant could have enforced its contract rights by resort to the courts.

The fact that changed circumstances, creating active competition between plaintiff and defendant, render it to the disadvantage of defendant to perform its contract, is no legal reason for releasing it from its obligations, where it appears that performance will benefit plaintiff.

Equity will not refuse specific performance of a contract having several years to run because performance requires the exercise of skill and judgment, and a continuous series of acts.

A contract is to be judged as of the time it was made, and, if fair when made, the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance.

Appeal from Supreme Court, General Term, Second Department.

Action by the Prospect Park & Coney Island Railroad Company against the Coney Island & Brooklyn Railroad Company for specific performance. In the Special Term a judgment was given for plaintiff, which the General Term (21 N. Y. Supp. 1046) reversed. The plaintiff took this appeal.

George W. Wingate, for appellant.

William N. Dykman, for respondent.

BARTLETT, J.—The parties to this action entered into a contract June 1, 1882, and the plaintiff seeks to compel its specific performance. The special term rendered judgment for plaintiff; the general term reversed the judgment, and the plaintiff comes here under the usual stipulation in case of affirmance. The reversal was for error both of law and fact, and the failure to insert a certificate that the case contains all the evidence having been cured by the amendment of the return by the Supreme Court, we are called upon to review the facts as well as the law.

At the time of making the contract, the plaintiff owned a steam surface railroad, usually known as "Culver's Coney Island Railroad," which extended from Coney Island to a

depot at the corner of Ninth avenue and Twentieth street, in the city of Brooklyn, and adjoining Greenwood Cemetery. The plaintiff also owned certain horse-car railroads, which were entirely distinct from the steam railroad, extending from the depot to Fulton Ferry; the plaintiff also owned a charter entitling it to construct a horse-car line from the depot to Hamilton Ferry and other points. The defendant, at the time of executing the contract, was operating certain horse-car lines which ran from Hamilton, Fulton and other ferries, and from the East River bridge to Ninth street and Ninth avenue, and through Ninth avenue to Fifteenth street, on Fifteenth street to Coney Island avenue, and thence to Coney Island. These lines were operated wholly by horses. By the contract the plaintiff granted the defendant the right to use its tracks on Ninth avenue from Fifteenth street to the depot at Ninth avenue and Twentieth street, free of charge, for twenty-one years from June 1, 1882. The defendant covenanted to run during the spring, summer and fall months, to plaintiff's depot, cars to connect with the ferries and all plaintiff's trains to and from Coney Island. The plaintiff agreed to furnish defendant necessary terminal facilities at the depot. This contract was obviously advantageous to both parties. The plaintiff secured passengers to Coney Island from defendant's lines, and the defendant greatly increased its travel by having a direct connection with steam transit to Coney Island. The defendant's horse-car line to Coney Island could not successfully compete with plaintiff's steam route. The plaintiff provided defendant with the necessary terminal facilities as required, and the contract was acted upon by both parties until the month of October, 1889. At that time there was a change in defendant's management, and the company contracted for an electrical equipment from the Parade Ground to Coney Island, commonly known as the "Trolley System." The plaintiff, in May, 1890, finding that defendant was not running cars to the

depot, as required by the contract, requested performance, and was advised that the defendant was under no obligations to run the cars, and did not intend to do it. This action was commenced the following October.

It is insisted by the defendant that the adoption of the trolley system is, in contemplation of law, a use of steam, under the clause in the contract which provides that if the defendant shall use steam as a motive power between Ninth avenue and Fifteenth street, in the city of Brooklyn and Coney Island, either party can terminate the contract on six months' notice, and that the correspondence and answer in this case are equivalent to notice, and the contract no longer exists. We agree with the special term that the electrical system adopted by the defendant cannot be regarded as the use of steam as a motive power: *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.*, 135 N. Y. 393, 402, 32 N. E. 148. It would be in disregard of the natural and obvious meaning of language to hold otherwise. We cannot agree with the general term that the use of the words "steam as a motive power" was only another form of referring to rapid transit, by whatever means accomplished. To so hold would be to make a new contract for the parties.

The defendant insists, further, that by reason of certain acts of plaintiff, and by changes in the surrounding circumstances, it would be inequitable and unjust to enforce a specific performance of the contract. This leads us to consider some additional facts disclosed by the record.

On the 9th of December, 1885, plaintiff leased to the Atlantic Avenue Railroad Co. all its franchises to construct and operate horse-car railroads in the city of Brooklyn, and on May 27, 1887, in pursuance of chapter 282 of the Laws of 1886, conveyed said rights and interests absolutely. The lease and conveyance were made expressly subject to the contract in question, and reserved all the defendant's rights thereunder. They also required the Atlantic Avenue Rail-

road Co. to operate the Vanderbilt Avenue Railroad Co. as had been previously done by the plaintiff. The defendant made no objection to this transfer until after its refusal to perform the contract. Defendant urges that it was greatly damaged by the fact that the Atlantic Avenue Railroad Co. had completed, under the franchise obtained from plaintiff, a horse-car line to the Hamilton Ferry. We are unable to perceive how defendant has suffered any damage, in view of the fact that it purchased with full knowledge of plaintiff's franchise, and its desire to dispose of the same. It appears by the uncontradicted evidence that defendant sought to purchase of plaintiff this franchise to complete a route to the Hamilton Ferry either just before or about the time the contract was executed.

The defendant further contends that the plaintiff, under a proper construction of the contract, was not at liberty to sell out its street-car interests, although not restrained by any positive provision. This contention is based mainly on the alleged fact that the Atlantic Avenue Railroad Co. is an active rival of defendant, and did not have the same motive to deal fairly with defendant that plaintiff had while seeking to build up its Coney Island business. The principal complaint against the Atlantic Avenue Railroad Co. is based upon the manner in which it performed the contract in regard to defendant's terminal facilities at the depot, corner Ninth avenue and Twentieth street. The evidence does not satisfy us that there was any persistent effort to delay the cars of defendant at that point, or to prevent passengers from the steam road selecting from the cars in waiting the one in which to ride, without undue interference. We think the contract was substantially performed by plaintiff and its grantee in regard to terminal facilities of defendant, and, even if this were not the case, the defendant could have compelled the observance of its contract rights in every particular by resort to the court. The fact, already referred to, that defendant continued to act under the con-

tract for more than four years after this lease to the Atlantic Avenue Railroad Co., without objection, must be taken very strongly against it in a court of equity. It seems to us very clear that when the management of defendant was changed, in October, 1889, and the road from the Parade Ground to Coney Island was operated by electricity, it at once became an active and successful rival of the plaintiff in securing passengers to and from Coney Island, and had every motive to rid itself of the contract, if it could be legally done. We agree with the learned trial judge that while it is impossible, under the state of the proofs, to determine to what extent plaintiff has been damaged by defendant's adoption of the trolley system, yet it is clear that it has suffered considerable loss. It is, of course, entirely legitimate for defendant to secure to itself whatever share of the Coney Island travel it can by the exercise of proper business methods, but we are unable to perceive any reason, under the proofs as presented, why defendant should be released from the obligations of a contract entered into in good faith by both parties, and that has been practically construed by years of performance. It may very well be that, under a contract having twenty-one years to run, there may be such a change of conditions as will affect unfavorably the one party or the other; but this offers no reason for refusing specific performance, unless subsequent events have made performance by the defendant so onerous that the enforcement would impose great hardship and cause little or no benefit to the plaintiff: *Trustees v. Thacher*, 87 N. Y. 316, 317; *Murdfeldt v. Railroad Co.*, 102 N. Y. 703, 7 N. E. 404. In the case at bar, the plaintiff, we think, would be benefited by defendant running the transfer car in Ninth avenue from Fifteenth street to its depot at Twentieth street. On the other hand, it may be assumed that the defendant, by cheaper fare, and its ability to carry passengers to Coney Island without transfer, will be able to secure its full share of the passengers to and from the seashore. The result of

compelling the specific performance of this contract will be to afford the general public an opportunity, when traveling over the line of defendant from the ferries, to make choice of the route they will take to Coney Island when arriving at Ninth avenue and Fifteenth street. While it may be somewhat to the disadvantage of defendant to perform its contract, under the present circumstances, when active competition exists between plaintiff and defendant, yet that fact presents no legal reason for discharging it from the obligations of its contract.

As a final point, the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run, which requires the exercise of skill and judgment, and a continuous series of acts. While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar. The special term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff. The provisions of this contract are neither complicated nor difficult, and are such as a court of equity can enforce in its discretion. A few of the cases may be referred to, as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer v. Railroad Co.*, 2 *Younge & C. N. R.* 48, the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In *Wilson v. Railway Co.*, *L. R.* 9 *Eq.* 28, the defendant was compelled to erect and maintain a wharf. See, also, *Greene v. Railroad Co.*, *L. R.* 13 *Eq.* 44. In *Wolverhampton & W. R. R. v. London & N. W. R. R.*, *L. R.* 16 *Eq.* 433, the agreement between the two companies was that the defendant should work the plaintiff's line, and, during the continuance of the agreement, develop and accommodate the local and through trade thereof, and carry over it certain specific traffic. The bill was filed to restrain the

defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made that the court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice. The injunction issued, and Lord SELBORNE said (page 438): "With regard to the argument that, upon the principles applicable to specific performance, no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which, in cases of this character, those words 'specific performance' are used. . . . The common expression, as applied to suits known by that name, presupposes an executory, as distinct from an executed, agreement. . . . Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the court requiring something or other to be done in specie. . . . Ordinary agreements for work and labor to be performed, hiring and service, and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for 'specific performance;' in other words, the nature of the contract is not one which requires the performance of some definite act, such as the court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. . . . The question is whether, the defendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession." The American cases are equally clear. In *Lawrence v. Railway Co.*, 36 Hun, 467, the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed; the court holding that although, under the agreement, the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined

from running any regular trains which did not stop at the station. The objection that the judgment in this case involves continuous acts, and the constant supervision of the court, is well met by the reasoning of *Central Trust Co. v. Wabash, St. Louis & P. Ry. Co.*, 29 Fed. 546, being affirmed as *Joy v. St. Louis*, 138 U. S. 1, 47, 50, 11 Sup. Ct. 243, where Judge BLATCHFORD wrote the opinion. As to inconvenience, or circumstances, which affect the interest of one party alone, constituting a reason why performance should not be decreed, the case of *Marble Co. v. Ripley*, 10 Wall. 339, 358, furnishes a clear discussion of the general principles involved. The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into, and, if fair when made, the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. See, also, *Stuart v. Railway Co.*, 15 Beav. 513; *Mortimer v. Capper*, 1 Brown, Ch. 156; *Jackson v. Lever*, 3 Brown, Ch. 605; *Paine v. Meller*, 6 Ves. 349; *Paine v. Hutchinson*, L. R. 3 Eq. 257; *Telegraph Co. v. Harrison*, 145 U. S. 459, 472, 473, 12 Sup. Ct. 900. A large number of other cases might be cited, sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary. There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether, in the exercise of a wise discretion, and in view of all the circumstances, specific performance should be decreed. After a most careful consideration of this case, we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed. The order of the general term is reversed, and the judgment of the special term is affirmed, with costs in all the courts.

All concur, except ANDREWS, C. J., who dissents on the ground that plaintiff, having established a rapid-transit road, although the propulsion is by electricity, has met the con-

dition of the contract which entitled it to terminate such contract, or at least has placed itself in such a position that a court of equity will not enforce specific performance.

Ordered accordingly.

The time at which the fairness of a contract is to be judged is the time of making it, or, at latest, the time when the contract becomes absolute; and the fact that subsequent circumstances have rendered it less beneficial to one party, except where such circumstances are due to the party who seeks to enforce the contract or, subject to the same exception, that its enforcement has become a hardship to the defendant, does not, generally speaking, afford a reason for the refusal of a decree for specific performance: *Fry, Spec. Perf.*, §§ 389, 418; *Revell v. Hussey*, 2 Ball & B. 288; *Lawder v. Blachford*, Beat. 522; *Webb v. Direct London & Portsmouth Ry. Co.*, 9 Hare, 129; *De G., M. & G.* 521; *Jones v. Lees*, 26 L. J. Ex. 9; *Evans v. Walshe*, 2 Sch. & Lef. 419; *Hawkes v. Eastern Counties Ry. Co.*, 1 De G., M. & G. 737; 5 H. L. C. 331 (*cf. Scottish North Eastern Ry. Co. v. Stewart*, 3 Macq. 382, 401); *Wood v. Griffith*, 1 Sw. 43; *Weekes v. Gallard*, 18 W. R. 331; *Stuart v. Ry. Co.*, 15 Beav. 513; *Mortimer v. Capper*, 1 Br. Ch. 156; *Jackson v. Tener*, 3 Ib. 605; *Paine v. Miller*, 6 Ves. 349; *Telegraph Co. v. Harrison*, 145 U. S. 459; *Paine v. Hutchinson*, L. R. 3 Eq. 287.

The exception to this rule is where circumstances arising subsequently to the making of the contract, are such that its enforcement would be a great hardship to the defendant and be of little or no benefit to the plaintiff: *City of London v. Nash*, 1 Ves. Sr. 12; *Costigan v. Hastler*, 2 Sch. & Lef. 160; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Conger v. N. Y., W. S. & B. R. Co.*, 120 N. Y. 29; *Davis v. Read*, 37 Fed. Rep. 418; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Davis v. Howe*, 2 Sch. & Lef. 340; and, in a proper case, the court may attach such terms to a decree for specific performance, where it is sought under changed circumstances, as will bring the parties as nearly as possible into the condition in which they would have been had the contract been enforced immediately after its making and performed under conditions then existing; thus in *Willard*

v. Tayloe, 8 Wall. 557, a fair contract was made for the lease of a hotel; the civil war coming on, the property increased greatly in value, while legal-tender notes depreciated one-half; the Supreme Court of the United States refused specific performance at the suit of the intending lessee, unless he would tender his rent in gold. Of course, when the hardship is brought about by acts of the defendant himself its existence can in no way interpose any obstacle to a decree for specific performance when what he has contracted to do is reasonably possible: *Fry, Spec. Perf.*, § 426; *Pembroke v. Thorpe*, 3 Swans. 437 n.; *Storer v. Great Western Ry Co.*, 2 Y. & C. C. C. 52.

There is authority for the position that equity will not order the performance of continuous acts: *Blackett v. Bates*, L. R. 1 Ch. App. 117; *Powell & Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, L. R. 9 Ch. 331; *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462; *Fry, Spec. Perf.*, §§ 91, 99; but on the other hand see *Storer v. Great Western Ry. Co.*, 2 Y. & C. C. C. 48; *Wilson v. Railway*, L. R. 9 Eq. 28; *Beach Mod. Eq. Juris.*, § 596; *Ross v. Union Pacif. Ry. Co.*, 1 Woolw. 26; *Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co.*, 13 Oh. St. 544; *Texas & Pac. Ry. Co. v. Marshall*, 136 U. S. 393; *South Wales Ry. Co. v. Wythes*, 5 De G., M. & G. 880; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 11 Sawy. 33; *Fallon v. R. R.*, 1 Dill, 120; *Marble Co. v. Ripley*, 10 Wall. 335; *Greene v. Railroad Co.*, L. R. 13 Eq. 44; *Wolverhampton & W. R. R. v. London & N. W. R. R.*, *Ib.* 16 Eq. 433; *Good v. North Eastern Ry. Co.*, *Ib.* 8 Eq. 666; *Rigby v. Great Western Ry. Co.*, *Ib.* 7 Ch. App. 409; *Lawrence v. Railway Co.*, 36 Hun, 467; *Central Trust Co. v. Wabash, St. Louis & P. Ry. Co.*, 29 Fed. Rep. 546; *s. c. sub nom. Joy v. City of St. Louis*, 138 U. S. 1. In some of these cases the effect of a specific performance was brought about by an injunction prohibiting the doing of acts which would prevent the performance or be a violation of the contract under consideration.

Illegal contract—Executed contract—Cancellation.**CINCINNATI, HAMILTON & DAYTON RAILROAD
CO. v. McKEEN.**

(United States Circuit Court of Appeals, Seventh Circuit,
October 1, 1894.)

[Reported 64 Federal Reporter, 36.]

Where the parties are in *pari delicto* an executed contract will not, as a general rule, be set aside because of want of authority to make it.

In May, 1887, complainant's board of directors authorized its vice-president, I., to buy 20,000 shares of the stock of the T. & I. Railroad Co., and directed the sale of certain stock of the D. & M. Railroad Co., owned by complainant, to provide funds for the purchase, which stock was accordingly sold. June 1, 1887, I., "trustee," entered into an agreement with defendant, by which defendant agreed to sell to I. 11,160 shares of stock of the T. & I. Railroad Co. and 4,446 shares of stock of the T. & L. Railroad Co., to deliver 8,560 shares of the T. & I. stock and all the T. & L. stock on June 4, and the remainder of the T. & I. stock in thirty days, and acknowledge the receipt of \$250,000 from I., who agreed, on June 4, to pay \$639,500 and execute his note for \$669,150 with the stock purchased as collateral. On June 4 the stock was delivered by defendant, and the money paid and note and collateral delivered by I., and a receipt signed by both parties acknowledging the receipt of stock, money and notes. Within thirty days defendant delivered the remainder of the stock. June 21 a meeting of complainant's stockholders ratified the sale of the D. & M. stock, with knowledge of the purpose of the sale, I. having been displaced as an officer of complainant, the board of directors passed two resolutions referring to the T. & I. stock, and treating it as the property of complainant, and subsequently brought two suits, before the present one, seeking relief based upon complainant's ownership of that stock. Upon this bill, alleging that the funds paid to defendant by I. belonged to complainant, and seeking to set aside the contract of June 1 as *ultra vires* the complainant, to declare defendant a trustee of complainant of the \$889,500 paid him by I., and to cancel the note given by I., *held*, that the contract had been fully executed; and both parties being equally chargeable with notice of its illegality, and no circumstances of oppression or fraud on defendant's part being established, it would not be set aside, nor would the note be canceled, the illegality of the contract being a complete defense at law, and the note being overdue at the commencement of this suit.

Appeal from the Circuit Court of the United States for the District of Indiana.

Before HARLAN, Circuit Justice, and BUNN and SEAMAN, District Judges.

Suit by the Cincinnati, Hamilton & Dayton Railroad Co. against William R. McKeen. Defendant obtained a decree. Complainant appeals.

This suit was brought to obtain a decree declaring the defendant, William R. McKeen, a trustee for the plaintiff, the Cincinnati, Hamilton & Dayton Railroad Co. and its stockholders, in respect to certain moneys, aggregating \$889,500 received by him from one Henry S. Ives and also canceling as against that corporation, an agreement in writing of June 1, 1887, signed by McKeen, individually, and by Ives, "trustee," and a note of June 4, 1887, given to McKeen, by Ives, as "trustee," for \$669,150, and payable six months after date.

The Circuit Court, held by Judge JENKINS when district judge, dismissed the bill for want of equity.

The case made by the pleadings and evidence is as follows:

Prior to May 30, 1887, Henry S. Ives, a vice-president of the Cincinnati, Hamilton & Dayton Railroad Co., an Ohio corporation, entered upon negotiations with the defendant, William R. McKeen, who at the time was the president and a stockholder of the Terre Haute & Indianapolis Railroad Co., an Indiana corporation, for the purchase of a majority of the shares of stock of the last-named company. McKeen did not at that time, as Ives knew, own a majority of such shares, although those held by him had been sufficient to give him practically the control of that company. He also owned 4,446 shares of stock in the Terre Haute & Logansport Railroad Co., an Indiana corporation, then under lease to the Terre Haute & Indianapolis Railroad Co. During the negotiations between Ives and McKeen, the latter distinctly stated to the former that some modifications must

be made in that lease before he would sell his stock in the Terre Haute & Indianapolis Railroad Co., unless Ives also purchased his stock in the Terre Haute & Logansport Railroad Co.

On the 30th day of May, 1887, the directors of the Cincinnati, Hamilton & Dayton Railroad Co., at a special meeting held in Cincinnati, adopted the following resolutions:

"Resolved, That Vice-President Ives is authorized to purchase 20,000 shares (par value \$50 each) of the total outstanding issue of 39,762 shares of the Terre Haute & Indianapolis Railroad Co. at a price not exceeding \$100 per share, and that the same shall be submitted to the stockholders of this company for ratification at the annual meeting, June 21 proximo; and, to provide for the payment of the same, it is further

"Resolved, That it is expedient that the guaranteed common stock of the Dayton & Michigan Railroad Co., now owned by and held in the treasury of this company, be sold for the benefit of this company; *provided*, that not less than \$1,000,000 par value thereof can be sold at the present time; and that, therefore, C. C. Waite, the vice-president and general manager, and F. H. Short, the assistant secretary, of this company, be and are hereby authorized and directed to cause the same to be sold at \$35 per share, being seventy per cent. of the par value thereof, and that the proceeds of such sale or sales be deposited in the treasury of this company," etc.

Pursuant to these resolutions, 20,500 shares of the guaranteed stock of the Dayton & Michigan Railroad Co., of the par value of \$1,025,000, were sold May 31, 1887, and certificates therefor were duly delivered to the purchasers.

It may be here stated that at this time the Terre Haute & Indianapolis Railroad Co., whose road extended from Indianapolis to Terre Haute, operated, under lease, a railroad extending from Terre Haute to East St. Louis, known as

the "Vandalia Line;" and the Cincinnati, Hamilton & Dayton Railroad Co., whose road extended from Cincinnati, by way of Hamilton, to Dayton, owned the entire capital stock of the Cincinnati, Hamilton & Indianapolis Railroad Co., whose road extended from Hamilton, Ohio, to Indianapolis, and was connected at Indianapolis with the Terre Haute & Indianapolis Railroad by way of the Belt & Union Railway tracks. The object, therefore, of the directors of the Cincinnati, Hamilton & Dayton Railroad Co. in authorizing the purchase of 20,000 shares of the stock of the Terre Haute & Indianapolis Railroad Co., must have been to obtain the control of a continuous line of railroad from Cincinnati to St. Louis.

On the 1st day of June, 1887, Ives and McKeen, pursuant to previous arrangement, met in Terre Haute for the purpose of closing up the business, about which they had been negotiating for some weeks. Ives was attended on that occasion by Mr. Ramsey, who at the time held the position of general counsel of the Cincinnati, Hamilton & Dayton Railroad Co., by Mr. Waite, vice-president and general manager of that company, and by Mr. Short, a director and the secretary and assistant treasurer of the same company. McKeen was attended by his counsel, Mr. Williams. At this meeting the written agreement which the bill prays may be canceled was signed by McKeen and by Ives, after having been examined by the respective counsel of the contracting parties. That agreement was as follows:

"This agreement, made and entered into this 1st day of June, A. D. 1887, by and between William R. McKeen, of the county of Vigo and state of Indiana, and Henry S. Ives, trustee,

"Witnesseth, that the said McKeen hereby agrees to sell, assign and transfer unto said Ives, 11,160 shares of the capital stock of the Terre Haute & Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute & Logansport Railroad Company, both corporations

of the state of Indiana, and to deliver the certificates for such stock to said Ives, as follows, to wit:

"Certificates for 8,560 shares of Terre Haute & Indianapolis stock and for 4,446 shares of said Terre Haute & Logansport stock on June 4, 1887, and the remainder of said Terre Haute & Indianapolis stock, to wit, 2,600 shares, on or before thirty days from this date.

"In consideration of the premises, the said Ives has this day paid to said McKeen \$250,000, and hereby agrees to pay him, on June 4, 1887, upon delivery of the certificates of stock aforesaid, the further sum of \$639,500, and also at the time last aforesaid the said Ives will execute and deliver to said McKeen a good and sufficient note for \$669,150, dated June 4, 1887, due on or before January 1, 1888, bearing six per cent. interest from date, and providing for the sale and purchase of the collaterals hereinafter mentioned, in the form and upon the terms usually adopted in cases of notes secured by collateral security. The said Ives further agrees that, as collateral security for the payment of the note above described, he will, on said June 4, 1887, assign and transfer unto said McKeen certificates for 8,560 shares of the capital stock of said Terre Haute & Indianapolis Railroad Company, and 4,446 shares of the capital stock of the said Terre Haute & Logansport Railroad Company, and will also, from time to time, likewise transfer and assign to said McKeen, as such collateral, any or all of the certificates for the 2,600 shares of said Terre Haute & Indianapolis which said McKeen is to deliver to him within thirty days from this date, as hereinbefore provided.

"It is agreed that, if said McKeen does not deliver any or all of said certificates for 2,600 shares within thirty days from this date as aforesaid, then the said McKeen shall pay or refund to said Ives the sum of \$200 for each and every share of said Terre Haute & Indianapolis stock which he may fail to deliver within said thirty days, as liquidated damages.

"Said Ives shall neither buy, directly or indirectly, nor offer to buy, any of said stock from any other party or parties until said thirty days shall have expired.

"WILLIAM R. McKEEN.

"HENRY S. IVES, *Trustee.*"

At the time this agreement was executed, McKeen, as Ives had been informed, did not own as much as 11,160 shares of the stock of the Terre Haute & Indianapolis Railroad Co., and it was contemplated that he would supply the deficiency by purchase from others within the time limited by the contract; and the last clause was inserted in order to protect him against competition with Ives in the stock market.

In part execution of the agreement, Ives paid \$250,000 to McKeen on the 1st day of June, 1887. The parties, attended by the same persons, with perhaps one exception, met again in Terre Haute on the 4th day of June, 1887, on which day Ives paid to McKeen the additional sum of \$639,500, and executed and delivered to the latter the note for which the above agreement provided, and which the bill prayed may be canceled. That note reads:

"\$669,150. TERRE HAUTE, IND., 4th June, 1887.

"Six months after date, or before, at my option, I promise to pay to the order of W. R. McKeen, at 25 Nassau street, New York, six hundred and sixty-nine thousand one hundred and fifty dollars, for value received, and without relief from valuation or appraisement laws, and with interest at six per cent. per annum after this date until paid; and I hereby pledge as security to the payment of this note, eleven thousand one hundred and sixty shares Terre Haute & Indianapolis Railroad Co. and 4,446 shares of Terre Haute & Logansport Railroad Co., with power hereby conferred upon the holder of this note to sell said stock, after default in the payment of this note, in such manner and at such times as he or they may deem proper, either at public or

private sale, without notice. Said W. R. McKeen, or the then holder of this note, shall have the right to purchase said stock at such sale.

“ HENRY S. IVES, *Trustee.*”

On the occasion of the execution of this note the contracting parties signed a paper in duplicate, of which the following is a copy :

“ This is to certify that on this, the 4th day of June, 1887, pursuant to the contract of June 1, 1887, by and between W. R. McKeen and Henry S. Ives, trustee, the said McKeen has assigned, transferred and delivered to said Ives 8,560 shares of the capital stock of the Terre Haute & Indianapolis Railroad Co. and 4,446 shares of the capital stock of the Terre Haute & Logansport Railroad Co., and has received from said Ives (\$639,500) six hundred and thirty-nine thousand five hundred dollars, and also the above-named shares of stock as collateral security for the payment of the note for (\$669,150) six hundred and sixty-nine thousand one hundred and fifty dollars provided for in said contract.

“ HENRY S. IVES, *Trustee.*

“ WM. R. McKEEN.”

Subsequently, June 13, 1887, McKeen transferred to Ives, trustee, one certificate calling for 2,594 other shares of the capital stock of the Terre Haute & Indianapolis Railroad Co., and six shares of stock in the same company were transferred to parties friendly to the Ives combination, in order that they might qualify as directors.

On the 4th day of June, 1887, after the execution and delivery of the note for \$669,150, and in order that the Terre Haute & Indianapolis Railroad Co. might pass under the control of Ives and his associates, the request was made that the directors, except McKeen, resign, and their places be supplied by others, to be named by the new owners of the stock. The old board was accordingly convened, when

Mr. Ramsey, the legal adviser of Ives and his associates, prepared an additional by-law providing that the board of directors at any meeting might fill any vacancies occasioned in the board by death, resignation or otherwise.

This by-law being adopted, Henry Ross, a member of the old board, resigned, and in his place Frederick H. Short, a director and the secretary and assistant treasurer of the Cincinnati, Hamilton & Dayton Railway Co., was elected to fill that vacancy. He immediately qualified and took his seat as a director. Mr. Williams, another member of the old board, also retired. Short thereupon presented a resolution ordering the sale to Henry S. Ives, trustee, for the price of \$62.50 per share, of 8,840 shares of the stock of the Terre Haute & Indianapolis Railroad Co., then in the treasury of the company, and standing in the name of McKeen, as its trustee. This resolution was adopted. Immediately thereafter Mr. Ramsey was elected a director, and entered upon the duties of the office. Three others of the old board then resigned, and their places were filled by the election of C. C. Waite, Henry S. Ives and Christopher Meyer. The board consisted of Short, Ramsey, Waite, Ives, Meyer, Collett and McKeen. To the board thus constituted McKeen tendered his resignation as president, and, on motion of Mr. Ramsey, Ives was elected president, and immediately assumed the duties of that position.

On the same day (June 4, 1887) certificates for the 8,840 shares of stock in the Terre Haute & Indianapolis Railroad Co., in the treasury of that corporation, were, by order of the board of directors, issued to Henry S. Ives, trustee. The latter delivered the same to Short, secretary and treasurer of that company, as well as assistant treasurer of the Cincinnati, Hamilton & Dayton Railroad Co. Ives, trustee, then made a draft upon Henry S. Ives & Co., of New York, payable to the order of the Terre Haute & Indianapolis Railroad Co., for \$552,500—representing the price of the 8,840 shares at \$62.50 per share—and delivered it to Short

or to the assistant treasurer of that company. By direction of Short, treasurer, the amount of that draft was simply credited to the payee on the books of Henry S. Ives & Co., of New York, who shortly thereafter failed in business. No part of the price agreed to be paid for the 8,840 shares was ever otherwise received by the Terre Haute & Indianapolis Railroad Co., or by any one in its behalf.

On the 21st day of June, 1887, at a meeting of the stockholders of the Cincinnati, Hamilton & Dayton Railroad Co., the following resolutions, offered by Mr. Short, were unanimously adopted:

"Whereas, the board of directors of this corporation, at a meeting duly held on May 30, 1887, duly passed and adopted the following resolution, which is duly recorded in the minutes of said meeting, viz.: [Here follow the resolutions of May 30, 1887, above referred to.] And whereas, under the foregoing resolution, the directors of the company did sell on May 31, 1887, twenty thousand five hundred shares of said guaranteed stock of the par value of \$1,025,000, the certificates for which were duly delivered to purchasers thereof. Now, therefore, be it resolved, that we hereby ratify, approve and confirm the said resolution, and the said sales of stock made thereunder, as well as all other acts done under said resolution."

The minutes of this stockholders' meeting, at which 36,307 shares were represented, make no express reference to the purchase of the stock of the Terre Haute & Indianapolis Railroad Co.; but the evidence showed, beyond all question, that the stockholders present at that meeting, with few, if any, exceptions, were aware of the fact—disclosed by the record of the meeting of the directors of the Cincinnati, Hamilton & Dayton Railroad Co., of May 30, 1887—that the guaranteed stock of the Dayton & Michigan Railroad Co. was directed to be sold "in order to provide for the payment" of the stock of the Terre Haute & Indianapolis Railroad Co., which Vice-President Ives had been previously

authorized to purchase. No supposition to the contrary could be justified by any reasonable view of the facts and circumstances.

As bearing upon the inquiry whether the contract between McKeen and Ives, trustee, was fully executed before the institution of the present suit, the following additional facts may be stated :

Within a short time after the above meeting of stockholders it was ascertained that, under the Ives management assets and securities belonging to the Terre Haute & Indianapolis Railroad Co. of the value of nearly \$2,000,000, as well as the 8,840 shares of treasury stock of the same corporation, had all disappeared. For what purposes they had been used is not shown. In consequence of disclosures of the dishonest practices of Ives, he was displaced as an officer of the Cincinnati, Hamilton & Dayton Railroad Co., and Julius Dexter became its president.

On the 3d day of December, 1887, the board of directors of the Cincinnati, Hamilton & Dayton Railroad Co. passed a resolution "that all of the capital stock of the Terre Haute & Indianapolis Railroad Co. purchased by this company in June, 1887, amounting to \$1,000,000, par value, shall be transferred upon the books of the said company unto Julius Dexter, as trustee, and that said Dexter be requested to execute a certificate of trust as to said stock, as the same shall be transferred to him." A copy of this resolution was furnished to McKeen on the 18th of January, 1888. And on the same day the Cincinnati, Hamilton & Dayton Railroad Co., by its general counsel, requested in writing that the dividend of July or August, 1887, and that to be declared February 1, 1888, "upon the shares of the stock transferred to Henry S. Ives, trustee, by the Terre Haute & Indianapolis Railroad Co., on or about June 4, 1887, amounting to 8,840 shares," be withheld, "said Ives having transferred said shares, or a large part thereof, to various parties, without the authority of the Cincinnati, Hamilton & Dayton

Railroad Co., whose trustee he was, and for whose benefit he held said shares."

The Cincinnati, Hamilton & Dayton Railroad Co., on the 8th day of December, 1887, commenced a suit against McKeen in the Circuit Court of the United States for the District of Indiana. The bill charged that prior to June 4, 1887, Ives, then vice-president of the plaintiff, "was authorized by its board of directors to purchase on behalf of your orator, and as trustee for it, 20,000 shares of the stock of the Terre Haute & Indianapolis Railroad Co., a corporation having a total capital stock of less than 40,000 shares, said shares being of the par value of \$50 each, at a price not to exceed \$100 per share. The defendant was advised of said action of the board of directors, and of the authority of said Ives thereunder, and thereupon sold to the said Ives, as trustee for your orator, 11,160 shares of the stock of said Terre Haute & Indianapolis Railroad Co., at the price of 200 per cent., or \$100 per share, amounting to \$1,116,000, and said Ives paid to the defendant on account of said purchase, out of the funds of your orator, as the defendant well knew, the sum of \$889,500, leaving a balance due on account of the said purchase of \$226,300."

The bill also charged that at or about the same time Ives purchased from the Terre Haute & Indianapolis Railroad Co., 8,840 shares of its stock, standing in the name of McKeen, at the price of \$552,500 (or \$62.50 per share), and paid for the same out of the plaintiff's funds; that, as part of the transaction, Ives, without the knowledge of the plaintiff, agreed to pay McKeen individually 75 per cent. of the amount of the stock, to wit, \$331,500, and also to purchase from McKeen individually 4,446 shares, of the par value of \$50 each, of the stock of the Terre Haute & Logansport Railroad Co. at the price of \$111,150; that, to cover the real transaction, Ives, as trustee, executed to McKeen the above note, dated June 4, 1887, for \$669,150, with interest at six per cent., and delivered the 11,160 shares of the stock

of the Terre Haute & Logansport Railroad Co. as collateral security for that note, with authority to McKeen or the then holder to sell the said stock, as indicated in the note, in case of default in meeting it. After stating that Ives had no authority to purchase the stock of the Terre Haute & Logansport Railroad Co. for or on account of the plaintiff, and that McKeen had always pretended to plaintiff, and plaintiff until recently had believed, that all of the 11,160 and 8,840 shares had been purchased from him at \$100 per share, the bill alleged that the real indebtedness of the Cincinnati, Hamilton & Dayton Railroad Co. to McKeen was \$226,500, the balance remaining after deducting \$889,500 paid by Ives from \$1,116,000, the price of the 11,160 shares at \$100 per share, which balance the plaintiff had offered and was willing to pay upon the return to it by McKeen of the 11,160 shares of the stock of the Terre Haute & Indianapolis Railroad Co.

The relief asked was that McKeen be enjoined from selling or otherwise disposing of said shares of stock, and that upon final hearing he be either required to accept \$226,500, with interest, in full and final payment of all obligations of the plaintiff upon the said note for \$669,150, to cancel that note against the plaintiff, and to deliver up the 11,160 shares of stock, or, in the alternative, that he be required to cancel that note as against the plaintiff, and return the sum of \$889,500 with interest from June 4, 1887.

On the 31st day of December, 1888, while that suit was pending, the Cincinnati, Hamilton & Dayton Railroad Co. brought a suit against the Terre Haute & Indianapolis Railroad Co., Ives and McKeen, in which it alleged that it was the owner of 20,000 shares of the stock of the latter company, which had been paid for with its funds; that 11,160 shares stood in the name of Ives, as its trustee, and the certificates therefor were held by McKeen as collateral security for a sum due to him from Ives, trustee; that the amount of the balance due was in dispute; and that Ives,

"without the consent, authority or knowledge of your orator, has wrongfully caused the residue of said 20,000 shares of stock belonging to your orator, and which were put in the name of your orator, viz: 8,840 shares, to be transferred to and unto the names of sundry persons, to your orator unknown, who are the clerks and agents of said Ives, but who nevertheless hold said stock, notwithstanding said unlawful transfers, as trustee for your orator, to whom said stock rightfully belongs." The bill in that suit also alleged that Ives was no longer an officer or stockholder of the Cincinnati, Hamilton & Dayton Railroad Co., and that Julius Dexter, its president, had been authorized to vote said stock of the Terre Haute & Indianapolis Railroad Co. at its next meeting. The relief asked was a decree enjoining Ives and McKeen from voting upon said 20,000 shares of stock, and requiring the Terre Haute & Indianapolis Railroad Co. to accept the vote cast thereon by Dexter for and on behalf of the plaintiff.

On the 17th day of February, 1888, the Cincinnati, Hamilton & Dayton Railroad Co. dismissed the first of the above suits, and on the same day brought the present suit. In the injunction suit brought December 31, 1887, the court denied the application for a preliminary injunction, and on the 3d day of March, 1888, the plaintiff dismissed that suit.

In his answer in the present suit, McKeen denied every allegation of the bill imputing to him fraud or deception, or which implied that the sale by him to Ives was upon any other terms than those indicated in the written agreement of June 1, 1887, or under any other circumstances than we have stated. His denials have not been overthrown by the evidence in the cause.

As already indicated, the relief sought by the Cincinnati, Hamilton & Dayton Railroad Co. is a decree declaring McKeen a trustee for that company and its stockholders in respect to the sums paid to him by Ives, aggregating

\$889,500, and canceling, as against that corporation, the written agreement of June 1, 1887, and the note for \$669,150, of June 4, 1887.

C. W. Fairbanks and Lawrence Maxwell, Jr., for appellant.

Miller, Winter & Elam (*Benj. Harrison and John M. Butler*, of counsel), for appellee.

HARLAN, Circuit Justice (after stating the facts as above reported).—The principal contention of the plaintiff is that the moneys paid to McKeen belonged to it, and although paid by Ives for its benefit and by authority of its directors, were paid in part execution of a contract unauthorized by the plaintiff's charter or by the statutes of the state of which it was a corporation; and the same view as to want of corporate power was urged in relation to the agreement and note signed by Ives, trustee.

The defendant, among other things, insists that he did not contract with Ives as representing, nor receive the moneys in question as coming from, or as being paid for, the plaintiff; that the contract between him and Ives was fully executed before this suit was brought; and that, under the circumstances disclosed by the evidence, a court of equity will not give the relief asked, even if it were true—which, however, the defendant denies—that the plaintiff was incompetent under its charter, or forbidden by the law of its creation, to make or to apply its funds in discharge of the agreement and note sought to be canceled.

If it be true that the plaintiff was without corporate power, under its charter or the laws of Ohio, to use its funds in the purchase of shares of the stock of the Terre Haute & Indianapolis Railroad Co. or of the Terre Haute & Logansport Railroad Co., and if it be also true that McKeen, during his negotiation with Ives knew, or should be held to have known, that the latter in fact represented the Cincinnati, Hamilton & Dayton Railroad Co., and that the cash payments made by Ives were with funds belonging to that corporation—upon

which matters we express no opinion—it does not follow that the plaintiff is entitled to the relief it now seeks.

It seems to the court that the cases of *Thomas v. Railroad Co.*, 101 U. S. 71, 85, and of *St. Louis, V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 395, 400, 406, 12 Sup. Ct. 953, particularly the latter, are decisive of this case.

In *Thomas v. Railroad Co.* the court said: "There can be no question that in many instances where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. In regard to corporations, the rule has been well laid down by COMSTOCK, C. J., in *Parish v. Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."

St. Louis, V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co. was a suit in equity by the St. Louis, Vandalia & Terre Haute Railroad Co., an Illinois corporation, against the Terre Haute & Indianapolis Railroad Co., an Indiana corporation, to set aside and cancel a conveyance of the plaintiff's railroad and franchise to the defendant for a term of nine hundred and ninety-nine years. The principal ground upon which the plaintiff corporation sought that relief was that the lease was void for want of lawful authority in either party to enter into it. The court adjudged that the contract was clearly beyond the corporate powers of the defendant company, but deemed it unnecessary to express a definite opinion upon the question whether the contract between the parties was beyond the powers of the plaintiff, because "a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both."

Assuming, as contended by the plaintiff in that case, that

the contract was *ultra vires* of the defendant, and therefore not binding upon either party, nor capable of sustaining a suit upon it at law or in equity by either party against the other, the court said :

“It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussion which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this.”

After showing that the English cases relied on were inapplicable to the case then under consideration, the court proceeded :

“The general rule in equity, as at law, is ‘*in pari delicto potior est conditio defendentis* ;’ and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity, unless the contract remains executory, or unless the parties are not in equal fault ; as, where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant : *Thomas v. Richmond*, 12 Wall. 349, 355 ; *Spring Co. v. Knowlton*, 103 U. S. 49 ; *Story, Eq. Jur.*, § 298. While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law ; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose : *Adams, Eq.* Consequently, it is well settled at the present day that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense : *Story, Eq. Jur.*, § 700 a, and cases cited ; *Simpson*

v. Howden, 3 Mylne & C. 97 ; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282. When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract : *Thomas v. Richmond*, above cited ; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284."

In illustration of the rule just stated, the court further said :

"In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws, of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant ; and the defendant has held the property, and paid the stipulated compensation from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract."

Has the contract which the appellant seeks to have rescinded been fully executed, or does it remain executory in any material respect ?

McKeen agreed to sell and deliver to Ives 11,160 shares of the capital stock of the Terre Haute & Indianapolis Railroad Co. and 4,446 shares of the capital stock of the Terre Haute & Logansport Railroad Co., certificates for the latter shares and for 8,560 of the 11,160 shares to be delivered to Ives on the 4th of June, 1887, and certificates for the remaining 2,600 shares of the stock of the Terre Haute & Indianapolis Railroad Co. to be delivered thirty days from that date. All these things were done by McKeen within the time limited by the written agreement.

In consideration of McKeen's agreement to sell and deliver these shares of the stock of both the Indiana corporations, Ives, on June 1, 1887, paid to McKeen \$250,000 in cash, and agreed to pay to him on the 4th of June, 1887, the additional sum of \$639,500, and to execute a note dated on that day for \$669,150, payable six months after date, and bearing six per cent. interest, and providing for the sale and purchase of the above certificates of stock in the form, and upon the terms, usually adopted in cases of notes secured by collaterals, and to assign and transfer those certificates to McKeen as collateral security for the payment of the above note. All these things were done by Ives within the time limited by the contract.

It would seem, then, that, within the meaning of the general rule to which we have adverted, the contract between the parties was fully executed on the 4th day of June, 1887. In *Sturges v. Crowninshield*, 4 Wheat. 122, 198, Chief Justice MARSHALL said that "a contract is an agreement in which a party undertakes to do, or not to do, a particular thing." And in *Fletcher v. Peck*, 6 Cranch, 87, 136, he said that "an executory contract is one in which a party binds himself to do, or not to do, a particular thing;" and "a contract executed is one in which the object of [the] contract is performed." Each particular thing specified in the agreement of June 1, 1887, to be done by the respective parties, was done on the 4th day of June, 1887; so that a

suit instituted after that day to compel its specific performance could have been dismissed upon the sole ground that nothing remained to be done which its provisions required at the hands of either party. If neither party could have maintained a suit of that character, it is not perceived upon what ground the contract between them could be characterized as executory in respect to any of its provisions. It cannot be deemed to have been executory because of the non-payment of the note for \$669,150 prior to the commencement of this suit. The written agreement of June 1, 1887, so far as it related to the balance of the price of the stock sold to Ives, after crediting the cash payments of \$250,000 and \$639,500, required only the execution and delivery of his note for a specified amount, containing certain provisions, and to be secured by the stock to be delivered to McKeen as collateral. Besides, under the law of the state in which the contract was made, anything may be regarded as payment which the creditor accepts as payment; and by the same law, if the note given in payment is negotiable according to the commercial law, the presumption is that it was received as payment: *Weston v. Wiley*, 78 Ind. 54, 56; *Warring v. Hill*, 89 Ind. 497, 501; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Louden v. Birt*, 4 Ind. 566; *Tilford v. Roberts*, 8 Ind. 254. Interpreting the agreement of June 1, 1887, in the light of the circumstances attending its execution, it cannot be doubted that the note for \$669,150, secured by the stock of the two Indiana corporations, was accepted by McKeen as payment. And Judge JENKINS well said, in the present case, that "whatever might be the rights of one who is to receive money under a contract, it cannot be that the party who is to pay in a specific manner, and has so paid by obligations satisfactory to the payee, can repudiate the transaction, and claim the contract still to be an existing, unexecuted agreement."

If, then, the original contract now sought to be rescinded was fully executed before this suit was brought, what prin-

ciple will justify the interference of a court of equity in behalf of the plaintiff? If the contract was illegal because beyond the corporate powers of the plaintiff, the parties were equal in fault—the one for using its funds for purposes foreign to the objects of its creation, the other for accepting and appropriating such funds; both being bound to take notice of the limitations which the statutes of Ohio put upon the authority of the Cincinnati, Hamilton & Dayton Railroad Co. Nor can the assistance of a court of equity be invoked upon any ground of oppression or fraud on the part of the defendant. Neither the bill nor the evidence suggests any fact showing oppression. Fraud in certain particulars is indeed charged by the bill, but the allegations to that effect are expressly denied, and the evidence does not overcome the answer on that point. The case, then, comes within the decisions of the Supreme Court of the United States above cited, so far as the bill seeks, in behalf of the railroad company, a decree adjudging the defendant to hold the moneys received from Ives in trust for it.

In respect to the prayer for the cancellation of the note given by Ives, there is no need for the interposition of equity, even assuming the contract, in all its parts, to have been illegal and void as beyond the corporate powers of the railroad company. If, at the time this suit was commenced, the company was liable to suit by McKeen, either at law or in equity, upon the note itself, or for its amount as being the balance of the stipulated price for the shares purchased by Ives, trustee, the illegality of that contract would have been a complete defense. Upon the theory that the contract was *ultra vires* of the plaintiff, it may be that a suit in equity might have been maintained for the cancellation of the note, if one had been commenced before the note fell due, and while there was danger of its being transferred to a *bona fide* holder for value, without notice from the note itself or otherwise of the illegality of the contract out of

which it arose. But this suit was not brought until after the maturity of the note, and therefore a transfer of it, after the institution of this suit, to a third person, would not have cut off any defense that the railroad company could have made as against McKen, the payee.

It may be stated as part of the history of this litigation that, a few days after the present suit was brought—that is, on the 27th of February, 1888—McKen notified both Ives, trustee, and the Cincinnati, Hamilton & Dayton Railroad Co., that under authority conferred by the note itself he would, at a named hour and place, on the 8th of March, 1888, sell as an entirety the stock pledged as a collateral security for its payment. It was sold at the time and place designated, McKen becoming the purchaser at the price of \$750,000. Of this purchase McKen notified the president of the Cincinnati, Hamilton & Dayton Co., as well as of the amount of the surplus in his hands over and above the face of the note. Although the facts relating to this sale were fully set forth in the answer of McKen, we have considered the question of the cancellation of the note in the light of the situation as it was when the present suit was brought. This we have done because it is insisted that the jurisdiction of the court to decree the cancellation of the note given by Ives depends upon the facts as they existed when that jurisdiction was invoked.

It has been suggested that these principles should not be applied to the injury of the stockholders of a corporation which has misapplied its funds in violation of its charter, or for objects foreign to those for which it was created. Whatever force this suggestion would have had if suit in the name of the corporation had been brought before the contract sought to be rescinded was fully executed, or however strongly, under some circumstances, it would appeal to the chancellor in a suit brought by or for the benefit of stockholders even after the execution of the contract, it is not entitled to weight in the present case. Although the plain-

tiff seeks a decree declaring that McKeen holds the \$889,500, received from Ives, in trust for its stockholders as well as for itself, there is no allegation in the bill that the stockholders were not fully aware of the negotiations between Ives and McKeen, or of the use by the plaintiff of its funds for the purchase of the stock of the two Indiana corporations. We are satisfied, from the undisputed facts and from all the circumstances of the case, that the stockholders, with very few, if any, exceptions, were cognizant of Ives' movements in the interest of the Cincinnati, Hamilton & Dayton Railroad and of himself. They could not have been ignorant of the transactions of Ives and his associates, nor of the two suits instituted in the Circuit Court of the United States sitting in Indiana. While they remained inactive, Ives contrived to dissipate a very large amount of the assets of the Terre Haute & Indianapolis Railroad Co. So that, when this suit was brought, the stock of that company, obtained by him from McKeen, had materially diminished in value. The restoration of the parties to their original position has become an impossibility; and, while that consideration alone might not justify the court in refusing to rescind an executory contract entered into by a quasi public corporation in violation of law, it is of great weight when the extraordinary power of equity to cancel an executed contract is invoked: *Delaine Co. v. James*, 94 U. S. 214; *Union R. Co. v. Dull*, 124 U. S. 182, 8 Sup. Ct. 433. We are of opinion that the corporation, so far as it may be considered as representing stockholders, is precluded from obtaining, at the hands of a court of equity, the relief asked in the bill: *St. Louis V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 393, 408, 12 Sup. Ct. 953; *Graham v. Railway*, 2 Macn. & G. 146.

For the reasons stated the decree below is affirmed.

The maxim, *In pari delicto potior est conditio defendentis et possidentis*, is now a well-recognized rule in equity (not withstand-

ing some early cases in which a contrary rule was, if not avowed, followed): *Osborne v. Williams*, 18 Ves. 379; *Watts v. Brooks*, 3 Ib. 612; *East India Co. v. Neave*, 5 Ves. 173; *Thompson v. Thompson*, 7 Ib. 469; *Knowles v. Hampton*, 11 Ib. 168; *St. John v. St. John*, Ib. 535; *Bosanquet v. Dashwood*, Cas. Temp. Talb. 37; *Hershey v. Weching*, 50 Pa. 240; *Allebach v. Hunricker*, 132 Ib. 349; *Anderson v. Carkins*, 135 Ib. 480; *Reidel v. Mulhausen*, 20 Ill. App. 68; *Harrison v. McClung*, 32 Mo. App. 481; *Knight v. Linzel*, 80 Mich. 396; *Pittsburg Carbon Co. v. McMullin*, 119 N. Y. 46; *Kirkpatrick v. Clark*, 132 Ill. 342; *Gray v. Oxnard Bros. Co.*, 8 R. & Corp. L. J. 104; *Becket v. Heston* (N. J.), 23 Atl. 1014; *Dent v. Ferguson*, 132 U. S. 30; *Keel v. Larkin*, 83 Ala. 142; *Tyler v. Tyler*, 126 Ill. 525; *Le Warne v. Meyer*, 38 Fed. Rep. 191; *Davies v. London & Prov. M. Ins. Co.*, 8 Ch. D. 469; *In re Great Berlin Steamboat Co.*, 26 Ib. 616; *Schermerhorn v. Tallman*, 14 N. Y. 94; *Knowlton v. Congress & E. Spring Co.*, 57 N. Y. 518; *Wheeler v. Sage*, 1 Wall. 518; *Bartle v. Coleman*, 4 Pet. 184; *Randall v. Howard*, 2 Black, 585; *Carll v. Emery*, 148 Mass. 32; *Battle v. Street*, 85 Tenn. 282; *Miller v. Kaertge*, 70 Tex. 162; *Moore v. Jordan*, 65 Miss. 229; *Gary v. Jacobson*, 55 Ib. 204; *Post v. Maish*, L. R. 16 Ch. Div. 395. A general limitation to this rule is found in the doctrine that where it is against public policy that a contract entered into by parties *pari delicto* should stand, then equity will interfere, notwithstanding the guilt of him who asks its interference. See *Story*, Eq. Juris., § 298; *Browning v. Morris*, Cowp. 790; *Morris v. McCulloch*, 2 Eden, 190; *St. John v. St. John*, *supra*; *Hatch v. Hatch*, 9 Ves. 292; *Roberts v. Roberts*, 3 P. Wms. 66; *Rider v. Kidder*, 10 Ves. 366; *Hess v. Culver*, 77 Mich. 598; and in such cases the law will distinguish between the degree of guilt of the parties and will allow the person who is the less guilty of two parties (unless the contract be *malum in se*: *Duval v. Wellman*, 124 N. Y. 156) to obtain relief; see the rule as laid down by KNIGHT BRUCE, L. J., in *Reynell v. Sprye*, 1 De G., M. & G. 660; and by CAMPBELL, J., in *Hess v. Culver*, *supra*; and see *Duval v. Wellman*, *supra*; *Foley v. Greene*, 14 R. I. 618; *Tracy v. Talmage*, 14 N. Y. 162; *Prescott v. Norris*, 32 N. H. 161; *White v. Franklin Bank*, 22 Pick. 186; *Lowell v. Boston*, etc., R. R. Co., 23 Pick. 32; *Bellamy*

v. Bellamy, 6 Fla. 62; *Phalen v. Clarke*, 19 Conn. 421; *Pickerton v. Brown*, 3 Jones Eq. 495; *Goshen Township v. Shoemaker*, 12 Oh. St. 624.

Assignment of patent—Construction—Subsequent competing patent—Reformation of instrument—Evidence.

ALLISON BROTHERS COMPANY *v.* ALLISON.

(Court of Appeals of New York, November 27, 1894.)

The word "improvement," referring to a patented machine or process, does not include a new and independent invention, although used for the same purpose as the first-mentioned machine or process.

An assignment of a patent "and improvements on the same which may hereafter be made" does not include a patent subsequently granted to the assignor for a machine to manufacture, by a different process, the same goods as were produced by the machine covered by the patent assigned, but which can be used without any of the machinery included in the earlier patent, and without infringing thereon. 23 N. Y. Supp. 1065, reversed.

An instrument apparently full and carefully drawn and formally executed will not be reformed so as to cover property not described therein on the uncorroborated evidence of two of the parties thereto as to statements by the other party, where the latter explicitly denies having made the statements.

Appeal from Supreme Court, General Term, Fifth department.

Action by the Allison Brothers Company against Oscar W. Allison to enjoin the defendant from manufacturing certain machines, or granting licenses to use them, and to reform certain agreements. From a judgment of the general term (23 N. Y. Supp. 1065) affirming a judgment in favor of plaintiff, defendant appealed.

Theodore Bacon, for appellant.

John Van Voorhis, for respondent.

GRAY, J.—The action was brought for the purpose of

enjoining the defendant from manufacturing cigarette machines, or granting licenses to use them, etc., and for the further purpose of reforming certain agreements, to which the defendant was a party, and which related to interests in patents for cigarette machines. The first purpose seems to have been abandoned, and the action, being tried upon the latter ground, resulted in a judgment for the plaintiff, reforming the agreements in question in the respects prayed for. The defendant had been a machinist, and became interested in the designing of machines for making cigarettes. Such a machine already existed; but he discovered a new mechanical process, and obtained a patent in 1880, "for a new and useful improvement in cigarette machines." Subsequently he assigned to his brother a half interest in the patent. In 1882, Clarke formed a partnership with them, and at first put \$5,000 into the business, under an agreement which licensed the firm to use the patented machines for a term of years. Very shortly afterwards, however, that agreement was canceled, and a new agreement was made, by which the two Allison's assigned, each, to Clarke an undivided sixth interest in two letters-patent "for an improvement in cigarettes and cigarette machines, and any improvements, renewals or reissues of said cigarettes, cigarette machines or letters-patent. . . . to the full end of the term for which said letters were granted, and for the term of any extension, any improvements thereof, or reissues thereof. . . . meaning hereby to vest in said Clarke one undivided third of said patents, extensions or improvements thereof." In 1883, Allen was admitted into the firm, and put into the business the sum of \$25,000, purchasing a fourth interest thereof. An agreement, drawn by him, was executed by the parties, by which there was assigned to him by the Allison's and Clarke "an undivided fourth part of all patents, machines, machinery, stock," etc., "now used and owned by parties of the first part in the manufacture of tobacco, cigarettes," etc., "under the firm

name of Allison Brothers & Co., as well as new patents, machines, machinery or appliances which may be obtained or used in connection with said business," the intention of the agreement being declared to be that each of the four parties should have "an undivided one-fourth interest in all patents and improvements on the same which may hereafter be made, machines, stock and business of the firm of Allison Brothers & Co., making each an equal partner in the same." The copartnership thus existing was thereafter changed into a corporation, which is the present plaintiff. A bill of sale was first executed, transferring to the new corporation the firm property and its patent interests; but later it was deemed expedient more formally to vest in the corporation the title to the patent interests, and an agreement was executed by the Allisons and Clarke, by which they, holding the record title, assigned to it their respective interests in the described letters-patent, which they had "heretofore enjoyed as members of the firm, and which had been used by said firm; this transfer to include any improvements, renewals or reissues of said patented improvements, or letters-patent," etc. The defendant, within a year, became dissatisfied, and severed his relations with the company. After he left, he discovered new mechanical devices for making cigarettes, and there were issued to him five letters-patent, each issue being "for improvements in cigarette machines." The object of the present action was to secure to the plaintiff the right to these new patents, by virtue of the assignments which have been referred to. The judgment recovered was based upon findings in each case to the effect that "the agreement which the writing was intended to express" was that Clarke or Allen took an equal interest with the others in the patents already issued, and in all the new inventions and improvements which the defendant should make in machinery for the manufacture of cigarettes; and if the writing was insufficient to express that agreement, the omission was "by the mutual mistake

of all the parties;" and also with respect to the corporation that was formed, the finding was of similar import—that the firm, and each member thereof, agreed to transfer to it every interest in improvements in cigarette machines, including the invention of new devices, etc., and all patents therefor, and if the bill of sale was insufficient, the omission was caused by the mutual mistake of the parties. In affirming the judgment below, the general term evidently was unwilling to place the right to relief upon a reformation of the instruments in question, and it was there held that they were sufficient to vest in the plaintiff the right to any and all after inventions. While it is readily perceived that it may be important to the plaintiff, as conducing to its business success and prosperity, to have the agreements so construed or reformed as to cover all new patents for inventions by the defendant of improvements in those machines, the question to this defendant is of paramount importance; for, if such was his agreement, he had assigned away for all time the product of his inventive talent in the line of its particular development; or, to refer to Mr. Justice BRADLEY's observation in *Manufacturing Co. v. Gill*, 32 Fed. 700, had given a "mortgage on his brain to bind all its future production."

As it seems to be usually the case with inventors, the defendant's necessities obliged him to have resort to some one possessed of means, in order to develop the machine on which he was then at work. The moneys went into that work, but not into his pocket. His severance of relations with the corporation, according to his account, was caused by the intolerable continuance of the material wants and the stress of his daily needs, pecuniary provision for which, he says, he was unable to procure to be advanced to him. Whether his account is true, or whether, according to evidence for the plaintiff, his departure was rather due to some unworthy motive to injure it for his own benefit, is, of course, not a controlling consideration. The question is, what had

the parties agreed to? With respect to these four instruments, the two first, mentioned as made with Clarke, and afterwards with Allen, only need engage our attention; for under the two subsequent ones to which the plaintiff corporation was a party, it could get nothing more, in our opinion, than what the firm of Allison Brothers & Co. owned. In the bill of sale the firm transferred to the plaintiff, besides the property and plant on hand, "all patents or interests in patents owned by any or either of said firm for improvements in cigarettes and cigarette machines, or machinery for manufacturing same." The subsequent and more formal assignment to plaintiff transferred to it "the rights and privileges enjoyed by said firm" in certain improvements covered by two described issues of letters-patent. The concluding statement, "this transfer to include any improvements, renewals and reissues of said patented improvements, or letters-patent Nos. —," etc., adds nothing to broaden the transfer. We must consider, then, what Clarke, and, after him, Allen, obtained from the defendant by the instruments to which they were parties. The assignment to Clarke was of a third interest in specific letters-patent, "and any improvements, renewals or reissues of said cigarette machines or letters-patent;" and the meaning of the instruments was declared to be "to vest in said Clarke an undivided third of said patents, extensions or improvements thereof." The assignment to Allen transferred to him from the firm, composed of the Allisons and Clarke, a fourth interest in the patents, etc., used by them in the manufacture of cigarettes, under the firm name of Allison Bros. & Co., "as well as new patents, machinery or appliances which may be obtained or used in connection with said business;" and the explicit declaration of "the intention of the agreement" was that each party should have a fourth interest "in all the patents and improvements on the same which may hereafter be made. . . . of the firm of Allison Brothers & Co.," etc. The important word in these in-

struments is "improvement," and it is to be noticed that it is used in connection with and as dependent upon the existent patents and machines. The improvements, an interest in which was transferred to Clarke, are described as "of said cigarette machines or letters-patent," or of the said patents. If, by that term, new and independent inventions were not included, then it is too doubtful to predicate a recovery upon what was comprehended in the assignment to Allen; for, apparently, he only obtained what the firm had a right to in the way of improvements; that is, "new patents . . . which may be obtained in connection with said business." His assignment related only to what the firm was using in the way of a patented machine. The term "improvement," used as it is here, with respect to certain patents or machines, cannot be deemed to be equivalent to some entirely new process, which is independent of the former invention. The same article produced by the former machine may be also produced by means of a new invention or device, which would be quite independent, in the process of manufacture, of the existing machine. It seems pretty plain that an agreement to include future improvements or additions to an invention should, in the purchaser's interest, be made to include any such process, if the purchaser is to preclude the vendor from afterwards setting up a rival invention. See *Morris Pat. Conv.* 33, 34. The patents in question in this litigation, precisely, are distinct and rival inventions; for it was proved and it was not disputed, that they were not infringements, and the finding of the court was that defendant's inventions cannot be used on plaintiff's machines without substantial alterations. Nor is there any finding that these new patents were improvements to or upon the machines owned by the plaintiff. The proof was that they not only do not make use of the plaintiff's devices, but that they cannot be used upon the existing machines. It must be borne in mind that the defendant was not the first inventor of a cigarette machine; he in-

vented improvements in such machines. An improvement might involve the addition of something which did not involve invention, and yet might modify or affect the result of operation. The word is to be governed, necessarily, in its application by the sense which the context lends to it. In these instruments, as the word is used, it conveys the idea of an improvement of or about the machine patented, and in use by the firm, by way of addition or change, and not of improvements in cigarette machines, which would be independent of the existing one. An improvement of a machine or of a patent, which these instruments mention, cannot, in our opinion, be deemed to cover all future inventions of devices for the making of cigarettes by machinery. Without citing authorities we think that they and the textbooks sustain the view that in order to include, generally, future patents for new inventions in the line of manufacturing a certain article or product, the language of the contract must be very plain, and evidence unmistakably that such an agreement was in the mind of the inventor, as well as in that of the purchaser from him of patent interests. That seems especially true in a case like this, where, as before observed, the inventions sought to be appropriated are devices wholly independent of those covered by plaintiff's patents, and capable of being put into practice without using its machines or infringing upon its patent rights. There is no difficulty, if the purchaser of an interest in patent rights wishes to include any improvements by new processes and devices, which the inventor may thereafter discover and patent, in expressing such an agreement in simple and unambiguous language, which will exclude doubt as to so far-reaching a contract.

Holding this view with respect to the construction of these instruments, should the decree below be sustained, which reforms them by inserting a clause appropriate to comprehend the defendant's future discoveries and patents? Is the proof of that decree that the court would be

authorized to alter the contracts of the parties on the ground stated "a mutual mistake" in expressing themselves therein? Certainly the power of a court of equity extends to giving relief, not only in cases where the agreement, through fraud or accident, varies from what the parties intended, but also where, through mistake, their intention has not been expressed: *Henkle v. Assurance Co.*, 1 Ves. Sr. 317. But as Lord Chancellor HARDWICKE observed in that case, "there ought to be the strongest proof possible" that "the contract in writing has been framed contrary to the intent and real agreement." Chancellor KENT said that "the most demonstrative proof, especially against the answer denying the mistake," was necessary: *Lyman v. Insurance Co.*, 2 Johns. Ch. 630. Judge REDFIELD, in a note to § 157 of Story's Equity Jurisprudence (11th ed.), says: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt." A court of equity, in correcting an agreement by parties upon the ground of mistake, proceeds upon the theory that it does not express their real sense, and it is most evident that the mutuality of the mistake must be made out, and the fact of a different agreement having been intended by both established by evidence which is clear and convincing. As SPENCER, C. J., said, upon the review of *Lyman v. Insurance Co.*, *supra*, in the Court of Errors: "It is not enough in cases of this kind to show the sense and intention of one of the parties to the contract. It must be shown incontrovertibly that the sense and intention of the other party concurred in it. In other words, it must be proved that they both understood the contract as it is alleged it ought to have been, and as in fact it was but for the mistake." So, in *Nevius v. Dunlap*, 33 N. Y., at page 680, BROWN, J., relying upon the authority of *Lyman v. Insurance Co.*, *supra*, and of Mr. Justice STORY (Eq. Jur. 157), observed: "To entitle a party to the decree of a court of equity reforming a written instrument, he must show, first, a plain

mistake, clearly made out by satisfactory proofs. Whenever the evidence is loose, equivocal or contradictory, or is in its texture open to doubt, or opposing presumptions, the relief will not be granted." In that case the question related to the reformation of a bond, and this court, considering the evidence not up to the requisite standard, reversed the judgment which the general term had affirmed. All of these observations with respect to the right to relief under this head of equity jurisprudence are in accord with the legal theory that courts of justice can only carry into effect such contracts as the parties have made, and cannot make contracts for them, which would be the result if they varied the executed instrument upon proof which was equivocal or contradictory. In the present case the proofs upon which the special term adjudged the relief were not only contradictory, but most equivocal. It is impossible to say that they are convincing with respect to the intention of the parties to make different agreements than those which were formally executed by them. The general term justices themselves seemed to doubt the sufficiency of the proof to warrant a reformation, for their opinion, in affirmance, proceeds upon the theory of a construction of the instruments favorable to the plaintiff's claim.

Let us consider these proofs. In the first place, we must bear in mind that cigarette machines were previously in existence as inventions, and that what the defendant discovered and worked out into practical shape was an improvement in such machinery or a new mechanical process, capable of making cigarettes to the greater advantage of the manufacturer, in economy, expedition or otherwise. Such a machine he had made and patented at the time he and his brother secured Clarke as a partner and the contribution from him of some capital. Capital was requisite to develop the particular machine when he came into the firm, and its ownership of a patent, for it was the inducement for the advance of capital to obtain an interest in the

partnership, which, at first, was only a license of the owners of the patent, and, subsequently, for the acquisition of an interest in the patent rights. When, afterwards, Clarke advanced more money, another patent had been taken out, and it was with reference to the two patents that he acquired by the assignment a third interest. The only evidence we have to show any intention of the parties to that instrument to agree differently than it expresses is in the testimony of Clarke as to preliminary conversations. He does testify that prior to the execution of the second instrument, in a conversation, the Allisonss said he should have the benefit of any improvements that should be made, and there was, possibly, enough said, in conversation, according to his testimony, to warrant him in supposing that there would be assigned to him an interest in future and new inventions of the defendant. When Allen testifies with respect to what occurred before his agreement was executed, he is more precise with respect to what the defendant represented, and his testimony, standing alone, would make out an intention that he should have, through his payment of moneys, an interest broad enough to include future and new inventions. He drew the agreement, and he was permitted to testify that he "intended to make it broad enough to cover the future inventions or machines Allison might make." But the instrument was already drawn at the time of the conversation in which defendant represented that he was going to make another machine, and that he (Allen) "was buying an interest in the whole thing," and not in consequence of it. But however, with respect to their several agreements, the testimony of Clarke and of Allen may be regarded, the defendant denies that he made the statements or representations attributed to him by each of them, and he explicitly denies that he, or, so far as he knew, his brother, ever agreed that, if more capital was put in, they would put in any invention pertaining to tobacco machines which they might invent. So, we have as

against instruments apparently full and carefully drawn, and each one of which was executed with many formalities, merely, in each case, the statement of Clarke or of Allen, which is explicitly contradicted by the defendant. The instruments are complete to transfer the interest in specific patents, and in any improvements of or upon the patented machine. Shall the court, in the face of an agreement complete upon its face, upon this contradictory evidence, make a different agreement for the parties? Is the proof positive enough and unequivocal? Can it be said that the findings are supported by the proofs? We think not, and we think that the facts, in the deliberations and negotiations of the parties prior to the making of each agreement, in the evidence of unusual care in its making, in the formalities of its execution, in the absence of any corroboration of Clarke or of Allen, in circumstances or otherwise, all together, tend to emphatically rebut the inference of any omission in the agreement of the nature claimed, and that they, taken in connection with the explicit denial and contradiction of the defendant, did not warrant the finding of a mutual mistake of the parties, whereby the agreements executed did not express their real agreements.

The views we have expressed lead to the conclusion that the judgment below should be reversed, and that a new trial should be ordered, with costs to abide the event. All concur. Judgment reversed.

Equity will not interpose to amend a written instrument without the clearest and most satisfactory proof both of the mistake and of the real agreement between the parties, and this is especially the rule when the mistake is denied in the answer: *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. 317; *Irnham v. Child*, 1 Bro. 94; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Lyman v. United Insurance Co.*, Ib. 630; *Hoover v. Reilly*, 2 Abb. (U. S.) 475; *Pennell v. Wilson*, 2 Robt. 509; *Watkins v. Stockett*, 6 Har. & J. 435; *Showman v. Miller*, 6 Md. 485; *Masterton v.*

Beers, 1 Sweeney, 418; *Veazie v. Williams*, 8 How. 157; *McDonnell v. Milholland*, 48 Md. 545; *Adair v. Adair*, 38 Ga. 49; *Liggett v. Shira*, 159 Pa. 350; *Northfield Farmers Twp. Mut. F. Ins. Co. v. Sweet*, 46 Ill. App. 578; *Atkinson v. Farrington Co. (N. J.)*, 28 Atl. 315; *Turner v. Shaw*, 96 Mo. 22; *Madrell v. Riddle*, 82 Ib. 31; *Benson v. Markoe*, 37 Minn. 30; *Cross v. Bean*, 81 Me. 525; *Monks v. McGrady*, 71 Tex. 134; *Kornegay v. Everett*, 99 N. C. 30; *Ely v. Early*, 94 Ib. 1; *Jarrell v. Jarrell*, 27 W. Va. 743; *Franklin v. Jones*, 62 Fla. 526; *Huston v. Citizens' Mutual Life Ins. Co.*, 63 Ala. 488; *Cox v. Wood*, 67 Cal. 317; *Cummins v. Budgin*, 37 N. J. Eq. 476; *Bell v. Ry. Co.*, 76 Ga. 754; *Sable v. Maloney*, 48 Wisc. 331; *Griswold v. Hazard*, 26 Fed. Rep. 135; *Harrison v. Hartford Fire Ins. Co.*, 30 Ib. 862; *Nevius v. Dunlap*, 33 N. Y. 676; *Ford v. Joyce*, 78 Ib. 618; *Muller v. Rhuman*, 62 Ga. 332; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Stiles v. Willis*, 66 Md. 552; *Mosby v. Wall*, 23 Miss. 81; *Dean v. Venley*, 17 W. R. 567; *Edmand's Appeal*, 59 Pa. 220.

A valid assignment of future improvements upon a machine may be made in connection with an assignment of the patent for such machine: *Littlefield v. Perry*, 21 Wall. 226; *Aspinwall Mfg. Co v. Gill*, 32 Fed. Rep. 697. The present case differs from the one last cited, in that the alleged improvement in the present case was a machine to manufacture by a different process the goods of the same character as those by the first patented machine; in *Gill's* case the process was found to be practically the same in each machine.

BRADLEY, J., in delivering the opinion said: "The new machine is better than the old one, no doubt; the spears are differently arranged so as to secure a potato more certainly every time; and other improvements are adopted; but to say that it is not an improvement on the old machine is to abandon the dictates of common sense for the transcendental distinction of ingenious theory. The principal ground for denying the new machine to be an improvement of the old is the difference in the arrangement of the spears; the old spear being bent like a hook, so as to strike the potato tangentially, and the new one being straight, nearly in line with the radius of the disk to which it is fastened. This is a difference in form but not in

principle. The object in both cases is to spear the potato. By the old method you strike it with the hooked spear; by the new you hold the potato while the spear enters it. The last is much the better device, no doubt, but in both you spear the potato. The last plan of doing it is an improvement on the old plan; that is all."

Equity—Right of stockholder to sue for redress of corporate wrong.

BELL v. MONTGOMERY LIGHT CO. ET AL.

(Supreme Court of Alabama, May 17, 1894.)

While, as a rule, a stockholder, before bringing suit to redress his grievances suffered in such capacity, is required to request the governing body of the corporation to bring suit, yet such request is not necessary when the corporate management is within the control of the guilty party, but the complaint must allege with particularity the facts which excuse the lack of a request to the governing body.

Appeal from the Chancery Court, Montgomery county.

Bill by Smith Cullom against the Montgomery Light Company and another to set aside the charter of the company defendant, and for an accounting. Cullom having died, the case was revived in the name of P. H. Bell, administrator of his estate.

The bill, as originally filed, was by a stockholder, and prayed to have the charter of the Montgomery Light Company vacated and annulled, and to require Ignatius Pollak to account for money received by him, on bonds or otherwise, which belonged to the company, and for other relief looking to the remedy of grievous wrongs, which were alleged in the bill to have been perpetrated by the said Pollak and his associates against the company and its stockholders.

A motion to dismiss the bill of want of equity was sustained, and plaintiff appealed.

J. M. Chilton, Thomas H. Clark and Sumter Lea, for appellant.

Tompkins & Gray, for appellees.

HARALSON, J.—1. The defendant pleaded to the bill as originally filed, that the whole interest of the complainant in the suit did not equal \$20, and this court had no jurisdiction of the case made by the bill; that all the other stockholders in said company, and all persons interested therein other than the complainant, had been cognizant of the change in the name of said company, of the increase of its capital stock and of the issuance of its bonds, and had made no objection to the said several acts, but, on the contrary, had indorsed, ratified and confirmed the same, and made no complaint thereof. The record shows, also, that the defendant demurred to the bill on grounds questioning its equity, and moved to dismiss it for want of equity. At the April term, 1892, as appears, the cause was submitted on a motion to dismiss for want of equity, on the demurrer, and on the plea and its sufficiency, with an admission of the truth of the plea. The cause was held up, on such submission, for decree in vacation. The court rendered its decree, holding that there was no equity in the bill, and that the plea, on an admission of the complainant that the facts stated in it were true, presented a good defense; and, upon consideration, it was ordered that the cause be dismissed, unless, during the term, an amendment, sufficient to give the bill equity, should be offered. The complainant accordingly sought and amended his bill: First. By adding the averments, that the nominal or face value of the stock held by him was \$8, but that its actual value was \$100; that notwithstanding the fraudulent acts and purposes of said Pollak, in procuring said amendments to the charter of the Montgomery Gas Light Company, in-

cluding its change of name, the act of the judge of probate in the matter was valid, and its validity was not questioned by the bill, especially so, as some of the bonds issued had passed into the hands of *bona fide* purchasers for value; that the legal title to the property of the Electric Light Company passed, under the purchase mentioned in the original bill, and the validity of said purchase was not questioned; but that said Pollak, while controlling both companies, as alleged in the original bill, sold said property to the Montgomery Light Company, at a sum greatly in excess of its value. Second. By striking out the prayer for special relief, as found in the original bill, and inserting in lieu thereof the prayer that said Pollak be made to account for and pay over the proceeds of the sale of \$125,000 of bonds sold by him and which belonged to said company; that a reference be ordered to ascertain the real value of the property sold by the Electric Light Company to the Montgomery Light Company at the time of the sale; that if it should appear that said Pollak, or said Montgomery Light Company, sold the same for more than it was worth, and that the trade was unfair, the said Pollak be required to turn over for cancellation (if he still owned the same) so much of said stock and bonds as should appear to be in excess of the true value of said property at the time of said sale, the proportion between the stock and bonds received by him being considered and observed in the matter of such cancellation, and if it should appear that such stock and bonds have been sold, then, as to said excess, he be required to pay in money. At the April term, 1893, of said Chancery Court, the bill, as amended, was submitted on a motion to dismiss it for want of equity, and the court, holding that it was without equity, dismissed it. He appeals from this decree dismissing the bill, and this is the only error assigned.

2. Complainant does not state in his bill what a share of the stock in the company is, but he does state that he owns

stock of the nominal face value of \$8, but that its value is \$100. The motion to dismiss the bill for the want of equity admitted this to be its value, and of this sum the Chancery Court has jurisdiction: *Hall v. Cannte*, 22 Ala. 650; *Campbell v. Conner*, 78 Ala. 211.

3. The bill was filed by a stockholder against the corporation of which he is a member, to remedy an alleged corporate wrong, without first having applied to the directors or the stockholders of the corporation for redress of his grievances or for action in conformity to his wishes. He excuses himself for not doing so, on the ground that any such an attempt would have been useless and futile, for reasons disclosed in his bill. Unless he has presented a good excuse for not having preferred this request, his bill is without equity and certainly liable to demurrer on that account. We have so many times discussed the law governing cases of this character, and it is so well settled in this court as to leave no necessity for its further consideration, except to make application of the well-settled rules to the cases as they may arise. It may be stated as the settled rule, that this request by the stockholder of the governing body for redress before he brings suit, is not necessary or required when the corporate management is under the control of the guilty parties, for the reason that they would not comply with the request, or if they did, the court would not allow them to conduct the litigation against themselves. But the complainant is required, nevertheless, to allege with particularity and definiteness the facts which excuse such a demand or request to the directors. See *Steiner v. Parsons* (Ala.), 13 South. 772; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 219, and the authorities cited in those cases; *Cook, Stock, Stockh. & Corp. Law*, § 741. If the facts stated in the bill are true—and on a motion to dismiss for want of equity, they must be so taken—frauds of the most grievous character have been committed by Pollak and his associate directors, which call for redress, and it may be that if tested

by a demurrer, these allegations constituting complainant's excuse for not making request of the corporation to remedy his alleged grievances, before bringing the suit himself for that purpose, would be held to be sufficient; but this we need not decide, since, if not sufficient, on a motion to dismiss for the want of equity, the lack of sufficiency of averment in this respect will be regarded as an amendable defect. It is well, in this connection, to call to mind our former rulings, holding, that under the rules of practice in this state, a motion to dismiss a bill for want of equity should prevail only when, admitting all the facts apparent on the face of the bill, whether well or illy pleaded, the complainant can have no relief, and that if it appear, upon proper averments of facts and appropriate prayer, equitable relief may be obtained, which cannot be had on the bill as framed, the motion to dismiss should be overruled and respondent put to his demurrer; that the bill for the purposes of such a motion will be considered, as if it had already been amended in all particulars in which amendments are proper: *Hooper v. Railroad Co.*, 69 Ala. 529; *Seals v. Robinson*, 75 Ala. 363; *Glover v. Hembree*, 82 Ala. 324, 8 South. 251; *Haynes v. Short*, 88 Ala. 562, 7 South. 157.

4. Whether the amendment allowed and made was a departure from and inconsistent with the case as made by the original bill, as is contended, we will not stop to consider on this motion. A demurrer was the proper means of reaching that vice, if it existed. We can have reference, at this time, only to the bill as it is presented to us by the amendment, and if it contains equity, or by still further amendment it can be made to contain it, it is our duty to set aside the decree of the Chancery Court dismissing it in order that defendant, if not satisfied with its present frame, may test the sufficiency of its averments, or any vice which it may be supposed to contain, by appropriate demurrer, and that complainant may, in that event, have the opportunity of

amending, as he may be advised. The motion to dismiss for want of equity, should have been denied. Reversed and remanded.

As a rule, a suit cannot be maintained by individual stockholders of a corporation to remedy illegal acts of its officers or to prevent their commission, until after the directors of the corporation have been requested to bring suit for the desired purpose and have refused to comply with such request, for in such case the corporation itself is the proper party to restrain its officers, and its name can be used as plaintiff only with the consent of its governing body: *Porter v. Sabin*, 149 U. S. 473; *Hawes v. Oakland*, 104 U. S. 450; *Dimpfell v. R. R. Co.*, 110 Ib. 209; *Boyd v. Sims*, 87 Tenn. 771; *Atchison & S. F. R. R. v. Sumner Co.*, 51 Kan. 617; *Putnam v. Ruch*, 54 Fed. Rep. 216; *Roman v. Woodfolk*, 98 Ala. 219; *Whitney v. Fairbanks*, 54 Fed. Rep. 985; *Allen v. Wilson*, 28 Ib. 677; *Dumphy v. Travellers Newspaper Asso.*, 146 Mass. 495; *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71. This, which is the general rule, is made the law as to the federal courts by the 94th Equity Rule: *Weidenfeld v. Allegheny & R. R. Co.*, 47 Fed. Rep. 11, which does not, however, apply to cases removed from a state court: *Evans v. U. P. R. R. Co.*, 58 Fed. Rep. 497. Where, however, the directors or the governing body, by whatever name it may be called, are the guilty parties against whom relief is sought, it is not necessary that the idle form of a request be gone through: *Brewer v. Boston Theatre*, 104 Mass. 378; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; *Carter v. Ford Glass Co.*, 85 Ib. 180; *Pond v. Vermont Valley R. R. Co.*, 12 Blatch. 280; *Heath v. Erie Ry. Co.*, 8 Ib. 347; *Ryan v. Leavenworth Ry. Co.*, 21 Kan. 365; *Peabody v. Flint*, 6 Allen, 52; *Jones v. Johnson*, 10 Bush, 649; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Booth v. Robinson*, 55 Md. 419; *Neall v. Hill*, 16 Cal. 145; *Deaderick v. Wilson*, 8 Baxt. 108; *Watts's Appeal*, 78 Pa. 370; *Davis v. Gemmell*, 70 Md. 356; *Solomon v. Laing*, 12 Beav. 377; *Kelsey v. Sargent*, 40 Hun, 150; *Nathans v. Tompkins*, 82 Ala. 437; *Knoop v. Bohmrich*, 49 N. J. Eq. 82; *Miller v. Murray*, 17 Col. 408; *Wickersham v. Crittenden*, 93 Cal. 17; *Hannerty v. Standard Theatre*

Co., 109 Mo. 297; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 340; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97; *Fitzgerald v. F. & M. Constr. Co. (Neb.)*, 59 N. W. 838; *Earle v. Seattle, L. S. & E. R. R. Co.*, 56 Fed. Rep. 909; *George v. Central R. & B. Co. (Ala.)*, 14 So. 752; *Eaton v. Robinson (R. I.)*, 27 Atl. 595; *Southwest Nat. Gas Co. v. Fayette Fuel Gas Co.*, 145 Pa. 13; *Taylor on Corp.*, §§ 688, 689; *Beach on Corp.*, § 886. To sustain jurisdiction in such a suit by a stockholder, the bill or other pleading must show circumstantially either a request to and refusal by the governing board to bring the suit or that it would be useless to apply to it; in other words, sufficient reason for not making the corporation plaintiff: *Dowd v. Wisconsin, etc., R. R. Co.*, 65 Wisc. 108; *Dannmeyer v. Coleman*, 11 Fed. 97; *Barr v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 444; *Detroit v. Dean*, 106 U. S. 537; *Hawes v. Oakland, supra*; *Shawhan v. Zinn*, 79 Ky. 300; *Morgan v. R. R. Co.*, 1 Wood, 15; *Ware v. Bazemore*, 58 Ga. 316; *Taylor, Corp.*, § 140; *Beach, Corp., supra*. It is insufficient if the pleadings merely set up that a majority of the directors are apparently against the party desiring to bring suit: *Huntingdon v. Palmer*, 104 U. S. 482; *Gas Co. v. Williamson*, 9 Heisk. 314; *Beach, Corp.*, § 886; or that the stockholders repeatedly protested without alleging that the protest was to the directors: *Boyd v. Sims, supra*; so the mere statement that a majority of the directors are under the control of the president and interested in one way or another in the frauds complained of: *Steiner v. Parsons (Ala.)*, 13 So. 771; but in *Smith v. Dove, supra*, the fact that a majority of the board of directors had participated in the acts complained of was considered enough to dispense with a demand that suit be brought by the corporation or directors.

The right of the stockholders to sue depends upon the attitude of the directors when suit is brought; it is not enough that they have in some time past failed to enforce the right whose violation is complained of: *Swope v. Villard*, 61 Fed. Rep. 417. Where a shareholder brings suit against directors and other officers for injuries to corporate interests or property or to restrain them from improper or illegal acts, or for an account, the corporation should be made a party defendant: *Greaves v. Gouge*, 69 N. Y. 154; *Robinson v. Smith*, 3 Paige,

222; *Cunningham v. Pell*, 5 Ib. 607; *Charleston Ins. Co. v. Sibling*, 5 Rich. Eq. 342; *Sears v. Hotchkiss*, 25 Conn. 71; *Black v. Huggins*, 2 Tenn. Ch. 780; *Davenport v. Dows*, 18 Wall. 626; *Fitzgerald v. F. M. Constr. Co.*, *supra*; *Taylor, Corp.*, § 690.

Creditor's right to cancellation of fraudulent conveyance.

WEHRMAN v. CONKLIN.

(Supreme Court of the United States, December 10, 1894.)

[Reported 155 U. S. 314.]

The general principles of equity jurisprudence, as administered in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the title of the plaintiff have been established by at least one successful trial at law.

The statutes of Iowa (Code, § 3273) having enlarged the jurisdiction of the courts of equity of that state by providing that "an action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," such enlarged jurisdiction, if sought to be enforced in a federal court, sitting within the state, can only be exercised subject to the constitutional provision entitling parties to a trial by jury, and to the provision in Rev. Stat., § 723, prohibiting suits in equity where a plain, complete and adequate remedy be had at law.

In December, 1859, the land, the subject of controversy in this suit, was patented to A. W. In the same month it was conveyed by A. A. and his wife to F. W. in an action founded upon a judgment obtained against him in a court in Wisconsin, which case proceeded to judgment against A. W. in September, 1861. Prior to levy of execution in that case, G., in a suit in equity against A. W. and F. W., obtained a decree declaring the deed to be void, and ordering the land to be sold in satisfaction of the judgment at law. Levy was made, the land was sold, and the sheriff made a deed conveying the property to G., who entered into possession, paid taxes, and in 1881, 1882 and 1884 conveyed the lands to C., who entered into possession and made valuable improvements upon

them. For thirty years the taxes had been paid by C. and his privies in estate. F. W. having set up a claim to the property by reason of alleged irregularities in the proceedings by which G. acquired title, and having commenced an action in ejectment to enforce that claim, C. filed this bill in equity setting up the foregoing facts, averring that the deed by A. W. to F. W. was a cloud upon his title, and praying for a stay of the action of ejectment, for an injunction against further proceedings at law, and for a decree that C. held the lands free and clear from all claims of F. W. A demurrer was interposed, setting up, among other things, that the writ of attachment was not attested by the seal of the court; that no service of summons or notice was had upon A. W. in the state of Iowa; and other matters named in the opinion. The demurrer being overruled, answer was made, and a final decree was made in plaintiff's favor. *Held*,

(1) That plaintiff had no adequate remedy at law, and the Circuit Court consequently had jurisdiction in equity;

(2) That if no action in ejectment had been begun at law the long-continued adverse possession of the plaintiff and the equitable title set up in the bill would have been a sufficient basis for the maintenance of the suit;

(3) That where title to real property is concerned equity has a concurrent jurisdiction, which affords more complete relief than can be obtained in a court of law;

(4) That the bill was in the nature of a judgment creditor's bill, setting up defects of title against which they had a right to ask relief from a court of equity;

(5) That it was immaterial whether the defects in the title of G. were well founded or not;

(6) That the absence of the seal did not invalidate the writ.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

This was a bill in equity bought by the appellees, Conklin and wife, to enjoin the appellant, Wehrman, from prosecuting an action of ejectment in the court below, against the appellees, to recover possession of the lands in controversy.

The bill, which was filed by T. B. Conklin and E. F. Conklin, whose Christian names are not given, but who appear from subsequent allegations to be husband and wife, set forth that they were the "absolute owners" of the prop-

erty, which had been purchased of the United States on June 9, 1857, by one Adolph Wehrman, who received a patent therefor on December 1, 1859. Afterwards, and on December 17, 1859, Adolph Wehrman and wife conveyed the land in controversy, with other lands—about 2,060 acres in all—by deed of warranty to the defendant, Frederick Wehrman, for an expressed consideration of \$3,000. This deed was recorded in the proper office for the county of Woodbury, to which the county of O'Brien, wherein the lands were situated, was then attached for judicial purposes.

The bill further alleges that on January 14, 1861, a co-partnership known as Greeley, Gale & Co. began an action at law, aided by an attachment in the District Court of O'Brien county, upon a judgment rendered by the Circuit Court of Pierce county, in the state of Wisconsin, against Adolph Wehrman, which judgment was based upon notes given prior to the date of the conveyance of said lands to the defendant by Adolph Wehrman. Such judgment was rendered after personal service upon Adolph Wehrman in the state of Wisconsin. A writ of attachment was issued by the clerk of the District Court of O'Brien county, and levied upon the lands in question, and notice personally served upon the defendant in the state of Wisconsin, although no service of summons or notice appears to have been had in the state of Iowa. At the time the writ of attachment was issued there was no time fixed by law for holding the term of the District Court in O'Brien county, though subsequently the judge appointed a term to be held on the 3d day of June, 1861, to which day the writ of attachment was actually made returnable. The venue of the cause having been changed to the county of Woodbury, on September 17, 1861, a judgment was rendered by the District Court of that county against the defendant Wehrman for \$1,809.40 damages and costs, and the lands "described in the writ of attachment" were ordered to be

sold in satisfaction thereof. A certified copy of this judgment was filed in the District Court of O'Brien county.

Afterwards, and prior to the June term of 1862, Greeley, Gale & Co. commenced a suit in equity in the District Court of O'Brien county against Adolph Wehrman and wife and Frederick Wehrman, for the purpose of setting aside and canceling the deed from Adolph Wehrman and wife to Frederick Wehrman as fraudulent and void against the creditors of the former, and subjecting the lands described in this deed to the payment and satisfaction of their judgment against Wehrman. The plaintiffs averred: That they were unable to set out the proceedings in such suit, for the reason that they had become lost and destroyed, but that there was personal service upon the defendants in the state of Wisconsin; that subsequently, and at the June term of 1862, a decree was rendered by default, declaring the deed to be fraudulent and void, and ordering the lands to be sold in satisfaction of the judgment rendered by the District Court of Woodbury county, and the proceeds to be applied to the payment of such judgment; that an execution was subsequently, and on June 16, 1862, issued from the District Court of Woodbury county, directed to the sheriff of O'Brien county, by virtue of which the sheriff levied upon the lands described in the writ of attachment, and sold the same on July 31, 1862, to Carlos S. Greeley, one of the members of the firm of Greeley, Gale & Co., who thereupon acknowledged satisfaction of the judgment; and that on December 31, 1864, the land not being redeemed, the sheriff executed to Greeley a sheriff's deed, which was filed, whereby Carlos S. Greeley became the absolute owner of the land.

That he subsequently acquired a tax title to such lands for the taxes of 1858 and 1859, and that said lands, by conveyances from Greeley in 1881, 1882 and 1884, became the property of Conklin, who took immediate possession, and has since been in full, open, notorious and adverse

possession of the same. That the plaintiffs and their grantors paid all the taxes upon such lands for thirty years, and have made valuable improvements by putting some six hundred acres under cultivation, by the erection of substantial buildings and fences, digging wells, and otherwise improving the premises. That such improvements have been made at an expense of \$1,000, and in full reliance upon their title being good and valid. That in the meantime defendant has never asserted any right or title to the premises or notified plaintiffs of his interest in the same. That Wehrman never asserted any claim to the premises until the land became valuable by reason of the plaintiffs' expenditures; has never paid any taxes upon the property, and, though having actual knowledge of the proceedings taken by Greeley, Gale & Co. to subject the land to the payment of their judgment, for more than twenty-seven years took no steps to have the records corrected, or asserted any claim or notified purchasers of such claim until his action at law was commenced.

The bill further averred the conveyance by Adolph Wehrman to be a cloud upon their title, and, being in actual possession and occupancy of the land, they prayed that the action in ejectment be stayed until the determination as to their rights to the land, and that Wehrman be enjoined from further proceedings at law.

Defendant interposed a demurrer to the bill for the want of jurisdiction and of equity, which was overruled; and he thereupon answered, setting up certain defects in the proceedings under which Greeley, Gale & Co. sold the land upon execution, and by virtue of which proceedings plaintiffs claimed to have acquired a title, viz.: (1) That the writ of attachment was not attested by the seal of the court in which the action was brought; (2) that no service of summons or notice was had upon the defendant Adolph Wehrman in the state of Iowa; (3) that such notice as was given described the action as having been

brought upon a judgment rendered May 12, 1860, when in fact the judgment was rendered September 12, 1860, and judgment was taken upon the attachment proceedings upon a judgment so rendered September 12, 1860; (4) that the writ of attachment was made returnable at a term commencing on June 3, 1861, when in fact the commencement of that term was not fixed until more than a month after the writ was issued; (5) that a change of venue was ordered from O'Brien county to Woodbury county, and the papers sent there without having been in any manner certified or verified by the seal of the court in which the suit was brought; (6) that the judgment was *in personam*, and ordered the property "described in the writ of attachment" to be sold to satisfy the same, when in fact no property was described in the writ, but only in the return of the officer indorsed thereon; (7) that in the subsequent equity suit to subject the land to the payment of this judgment there was no personal service or notice of process upon the appellant, Frederick Wehrman, in the state of Wisconsin; (8) that the tax deed was defective, inasmuch as the taxes on the lands for 1858 and 1859 were payable by law to the treasurer of Woodbury county, whereas the tax deed shows that the treasurer of O'Brien county attempted to sell the lands for taxes and give a tax deed.

The case was argued upon pleadings and proofs, and the court made a final decree in which the adverse claims of the defendant, Wehrman, were adjudged to be invalid and groundless, the complainants decreed to be the true and lawful owners of the land, and their title to be quieted against the claims of the defendant, who was perpetually enjoined from setting up the same, and, further, that defendant be enjoined from further proceedings at law.

From this decree, defendant appealed to this court. The opinion of the court upon demurrer is found in 38 Fed. 874, and upon final hearing in 43 Fed. 12.

Charles A. Clark, for appellant, as to the question of equitable jurisdiction, said :

Wehrman brought his action at law to recover possession of the lands in controversy. He claims by a strict legal title. Conklin claims by a strictly legal title. Appellant was entitled to a trial by jury to determine the validity of his title and that of Conklin. Equity has no jurisdiction to deprive him of this right: *Lewis v. Cocks*, 23 Wall. 466; *Fussell v. Gregg*, 113 U. S. 550; *Killian v. Ebbinghaus*, 110 U. S. 568; *Hipp v. Babin*, 19 How. 271; *Grand Chute v. Winegar*, 15 Wall. 373; *Whitehead v. Shattuck*, 138 U. S. 146.

It will be observed that these decisions proceed upon the ground that both parties have a constitutional right to trial by jury. The party out of possession, who brings his action at law to eject his adversary and try the question of legal title to the real estate, is as much entitled to the right of trial by jury as the party in possession, who also claims under a legal title.

Both parties to this controversy claim that they hold the legal title to the land. If Conklin holds such legal title by virtue of the sheriff's deed, or his tax deed, under which he claims, he has an adequate and complete remedy at law by asserting and maintaining such legal title in the action at law brought against him by Wehrman.

If, however, the pretended equitable estoppel which he sets up is requisite to the establishment of his title or right to possession of the lands, he can prove and establish that equitable estoppel as a defense in the action at law as well as he can assert it as a foundation for his suit in equity. Such is the established doctrine of this court: *Dickerson v. Colgrove*, 100 U. S. 578; *Kirk v. Hamilton*, 102 U. S. 68; *Bacon v. Northwestern Ins. Co.*, 131 U. S. 258.

So far as any question of equitable estoppel is concerned, therefore, Conklin had an adequate and complete remedy

at law, by asserting and proving such estoppel as a defense to the action in ejectment.

It is also settled law that the equitable jurisdiction of federal courts can be neither enlarged nor diminished by state legislation. Such was the decision of this court in a case cited *supra*, where the statutes of Iowa authorized a suit in equity on a legal title against a party in the possession of real estate: *Whitehead v. Shattuck*, 138 U. S. 146. See, also, *Mississippi Mills v. Cohn*, 150 U. S. 202; *Payne v. Hook*, 7 Wall. 425; *McConahy v. Wright*, 121 U. S. 205; *Scott v. Neely*, 140 U. S. 106; *Gates v. Allen*, 149 U. S. 451; *Swan Land and Cattle Co. v. Frank*, 148 U. S. 612.

Ernest C. Herrick, for appellees.

Mr. Justice Brown, after stating the facts, delivered the opinion of the court.

This is a bill in equity, not only to stay an action of ejectment at law, but to remove a cloud cast upon the Conklins' title to the lands in question, created by a deed from Adolph Wehrman to Frederick Wehrman, appellant and defendant in the bill, and to quiet their own title thereto.

1. Defendant's principal contention is that equity has no jurisdiction of the case, for the reason that the contest concerns the legal title only, and that plaintiffs have a plain, adequate and complete remedy at law. It is undisputed that Carlos S. Greeley, a member of the firm of Greeley, Gale & Co., bought the lands in question at a sheriff's sale, which took place on July 31, 1862, and that for about twenty years thereafter, when the lands were sold to Conklin, he paid the taxes upon the land. That the Conklins, upon their purchase of the several parcels, took immediate possession, and that they have since been in full, open and adverse possession and occupancy of the same; have made large and valuable improvements thereon by putting some six hundred acres under cultivation, and by erecting substantial

buildings and fences, digging wells, and otherwise improving the premises, making the same more valuable, and have expended \$1,000 in such improvements, in good faith and full reliance upon such title being good and valid. That the defendant during such time, and for more than twenty-seven years, has never done any act or taken any step to have the records corrected, or to assert any claim on his part to such lands, or to notify purchasers of his interest in the same, until he began his action of ejectment.

The general principles of equity jurisprudence, as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law: Pom. Eq. Jur., §§ 253, 1394, 1396. At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was in fact only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace. A statement of the underlying principles of such bills is found in the opinion of this court in *Holland v. Challen*, 110 U. S. 15, 19, in which it is said: "To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded

against vexatious litigation and the irreparable mischief which it entailed."

This method of adjusting titles by bill in equity proved so convenient that, in many of the states, statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

The statute of Iowa, upon which this bill is based, is an example of this legislation, and provides (Code, § 3273) that "an action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession."

It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars:

(1) It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment.

(2) It dispenses with the necessity of his title having been previously established at law.

(3) The bill may be filed by a party having an equitable as well as a legal title: *Grissom v. Moore*, 106 Ind. 296; *Stanley v. Holliday*, 30 N. E. 634; *Echols v. Hubbard*, 7 South. 817.

(4) In some states it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill.

These statutes have generally been held to be within the constitutional power of the Legislature; but the question still remains, to what extent will they be enforced in the

federal courts, and how far are they subservient to the constitutional provision entitling parties to a trial by jury, and to the express provision of Rev. St., § 723, inhibiting suits in equity in any case where a plain, complete and adequate remedy may be had at law? These provisions are obligatory at all times, and under all circumstances, and are applicable to every form of action, the laws of the several states to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law, *Boyce v. Grundy*, 3 Pet. 210; and, as was said in *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 210, "was intended to emphasize the rule, and to impress it upon the attention of the courts." It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.

The question of enforcing these state statutes was first considered in *Clark v. Smith*, 13 Pet. 195, in which a bill was filed by a party in possession to compel the defendant to release a pretended title to certain lands claimed by him under patents from the state of Kentucky. The conveyance asked by the bill was sought to be in conformity with the provisions of an Act of the Assembly of Kentucky giving jurisdiction to courts of equity in such cases. It was held that, the Legislature "having created a right, and having at the same time prescribed this remedy to enforce it, if the remedy prescribed is consistent with the ordinary modes of procedure on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. On the contrary, propriety and convenience suggest that the practice should not materially differ where titles to land are the subjects of investigation." This case was cited and approved in *Parker v. Overman*, 18 How. 137, where a proceeding under a statute of Arkansas prescribing a special remedy for the con-

firmation of sales of land by a sheriff was held to be enforceable in the federal courts. In *Holland v. Challen*, 110 U. S. 15, the principle of this case was extended to one of wild land, of which neither plaintiff nor defendant was in possession. Plaintiff claimed under a tax title, and the property was described in the bill as unoccupied, wild and uncultivated land. The question was elaborately examined, and the jurisdiction sustained upon the ground that an enlargement of equitable rights by state statutes may be administered in the federal courts as well as in the courts of the state; citing *Clarke v. Smith*, and the case of *Broderick's Will*, 21 Wall. 520. The case was treated as one where the plaintiff had no remedy at law against the defendant, who claimed an adverse interest in the premises. In delivering the opinion, however, it was intimated, page 25, that if a suit were brought in the federal court, under the Nebraska statute, against a party in possession, "there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking." Another step in the same direction was taken in *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, in which a bill was sustained upon an equitable title, although it would appear from the report of the case that such title was not fortified by an actual possession; and in *Chapman v. Brewer*, 114 U. S. 158, a similar suit was upheld under a statute of Michigan permitting bills to quiet title to be filed by any person in possession.

Subsequent cases, however, denied the power of the federal courts to afford relief under such statutes where the complainant was not in possession of the land, and in *Whitehead v. Shattuck*, 138 U. S. 146, particularly, it was held that where the proceeding is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. "The right which in this case the

plaintiff wishes to assert is his title to certain real property ; and the remedy which he wishes to obtain is its possession and enjoyment ; and in a contest over the title both parties have a constitutional right to call for a jury." The case of *Holland v. Challen* was distinguished as one where neither party was in possession of the property, and it was further said that in the case of *Reynolds v. Bank* the question did not arise as to whether the plaintiff had a remedy at law, but whether a suit to remove the cloud mentioned would lie in a federal court. The case of *U. S. v. Wilson*, 118 U. S. 86, was really to the same effect, though not cited in *Whitehead v. Shattuck*. See, also, *Frost v. Spitley*, 121 U. S. 552. But nothing was said in either of these to disturb the harmony of the previous cases.

The real question, then, to be determined in this case, is whether the plaintiffs have an adequate remedy at law. If they have, then § 723 is controlling, and, notwithstanding a local practice under the Code, where no discrimination is made between actions at law and in equity, may authorize such suit, the federal courts will not entertain the bill, but will remit the parties to their remedy at law. The bill under consideration alleges the plaintiffs to be the "absolute owners" of the premises, and then sets forth certain proceedings by which it is alleged they became such ; but it is claimed and substantially admitted in the bill that, by reason of certain irregularities in these proceedings, it is doubtful whether the legal title ever became vested in the plaintiffs. The bill then sets up the long possession of the plaintiffs and their grantors, large outlays by them in improvements upon the land, and the practical abandonment of the same by the defendant, all of which, it is claimed, constitute an estoppel *in pais*. Plaintiffs also rely upon the laches of Wehrman in bringing the action in ejectment, and allege a failure to bring his suit within the period prescribed by the statute of limitations. It is entirely clear that, if no action in ejectment had been begun at law, the long-continued ad-

verse possession of the plaintiffs, and the equitable title set up in the bill, would have been a sufficient basis for the maintenance of the suit; and it is not easy to see why the commencement of such action should place them in a worse position than they were in before, or oust them of their remedy in equity.

If the only contest in this case were as to whether the legal title to these lands was in the plaintiffs or defendant, it may be that a court of law would be the only proper forum for the settlement of the dispute; but the plaintiffs further claim that, by reason of certain defects in the proceedings by which they acquired title, such title is doubtful at law, but that the long delay of the plaintiff at law in the assertion of his rights establishes a defense of laches, and his failure to set up his title, and his long acquiescence in the Conklins' possession of the lands, estop him from proceeding either at law or in equity to oust them.

It is scarcely necessary to say that complainants cannot avail themselves, as a matter of law, of the laches of the plaintiff in the ejectment suit. Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after the lapse of nineteen years and eleven months, he is as much entitled, as matter of law, to maintain it, as though he had brought it the day after his cause of action accrued, though such delay may properly be considered by the jury in connection with other facts tending to show an estoppel. As was said by Chancellor GREEN in *Horner v. Jobs*, 2 Beasley (13 N. J. Eq.) 19, 23: "Nor can the staleness of the claim, or the lapse of time, or the statute of limitations, avail the complainant. The defendant is asking no relief at the hands of this court. He was seeking to enforce his legal rights in a court of law. The complainant is here asking the aid of this court. It is the

claim of the complainant, not the title of the defendant, to which the equitable defense of a stale claim is applicable. No lapse of time can avail the complainant, unless it be a bar to the defendant's title under the statute of limitations. This defense will avail the defendant at law as well as in equity, and constitutes no ground for enjoining proceedings at law." Had Wehrman seen fit to resort to a court of equity in assertion of his rights, undoubtedly the defendants to such suit might have interposed the defense of laches, but it is quite a different question whether it could be made the basis of a bill. It may, however, be considered as one of the facts of the case tending to show an estoppel.

Undoubtedly, the facts set forth in this bill are such as tend to show an equitable estoppel on the part of Wehrman, and this court did hold in a very carefully considered opinion in *Dickerson v. Colgrove*, 100 U. S. 578, that an estoppel *in pais* was an available defense to an action at law. This case was cited and applied in *Baker v. Humphrey*, 101 U. S. 494; in *Kirk v. Hamilton*, 102 U. S. 68, and in *Drexel v. Berney*, 122 U. S. 241; although, in the last case, the bill was supported upon the ground that a resort to a court of equity in the particular case was necessary in order to make the estoppel available. As was said by Mr. Justice MATTHEWS: "All that can properly be said is that, in order to justify a resort to a court of equity, it is necessary to show some ground of equity, other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law." To the same effect is *Gable v. Wetherholt*, 116 Ill. 313.

But even if it be assumed that the facts relied upon as constituting an equitable estoppel in this case might be laid before a jury in a common-law action, and, if established, operate as a defense, yet it does not necessarily follow that a bill in equity will not also lie to cancel the outstanding deed from Adolph to Frederick Wehrman as fraudulent, or at least as unavailable under the peculiar circumstances of the

case. There is a class of cases which hold that where there is actual fraud no remedy at law is complete and adequate, except that which removes the fraudulent title. As early as 1750 it was held by Lord Chancellor HARDWICKE, in *Bennet v. Musgrove*, 2 Ves. Sr. 51, that a bill would lie by an execution creditor to set aside a fraudulent conveyance, whether he could recover at law or not. Objection having been made to the bill upon the ground that the remedy at law was complete, the lord chancellor observed: "But be it as it may, whether he could recover or not, he is entitled to come into this court; the distinction in this court being, where a subsequent purchaser for valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made without actual fraud, the court will say, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this court to set aside that conveyance; which is a distinction between actual and presumed fraud from its being merely a conveyance." This is still the law in England: *Blenkinsopp v. Blenkinsopp*, 1 De Gex, M. & G. 495. The leading case in the federal courts upon this point is *Bean v. Smith*, 2 Mason, 252, in which Mr. Justice STORY held that, notwithstanding the restrictive clause of the Judiciary Act (Rev. St., § 723), a judgment creditor might file a bill in equity against his debtor to set aside a fraudulent conveyance, since there is not, in the proper sense of the term, a plain, adequate and complete remedy at law.

While, in view of our decisions in *Insurance Co. v. Bailey*, 13 Wall. 616, and *Buzard v. Houston*, 119 U. S. 347, there may be a doubt whether this remedy is available in personal actions, the law is well settled that, where title to real property is concerned, equity has a concurrent jurisdiction, because it may not only enjoin an action at law, but may order a cancellation of the fraudulent conveyance, and pro-

hibit the bringing of further suits at law upon the fraudulent title, and thus afford a more complete relief than is possible in a court of law: *Dodge v. Griswold*, 8 N. H. 425; *Tappan v. Evans*, 11 N. H. 311; *Sheafe v. Sheafe*, 40 N. H. 516; *Miller v. Scammon*, 52 N. H. 609; *Traip v. Gould*, 15 Me. (3 Shepley) 82; *Cox v. Dunham*, 4 Halst. Ch. (8 N. J. Eq.) 594; *Sheppard v. Iverson*, 12 Ala. 97; *Bank v. Walker*, 7 Ala. 926; *Murphy v. Blair*, 12 Ind. 184; *Mohawk Bank v. Atwater*, 2 Paige, 54; 2 Pom. Eq. Jur., § 1415.

When analyzed, the bill under consideration is really in the nature of a judgment-creditor's bill filed by the plaintiffs, who claim that they have acquired, by successive assignments from the original creditors, a lien upon certain lands which the debtor has conveyed in fraud of the original creditors. There are also, it is true, the additional reasons that the plaintiffs have long been in possession of the land; and the records of the case, through which the original purchaser at the execution sale claimed to have acquired the legal title to the lands, have been lost, and that their title, though perfectly good in equity, may be technically insufficient at law. In such case they have a right to call upon a court of equity for relief against such defects: *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 449; *Stone v. Anderson*, 6 Fost. (26 N. H.) 506; *Conroy v. Woods*, 13 Cal. 626; *Robert v. Hodges*, 16 N. J. Eq. (1 C. E. Green) 305.

2. Upon the merits, the case presents no difficulty whatever. We do not find it necessary to examine in detail the several defects which are claimed to invalidate the proceedings under which Greeley finally became the purchaser of the land in question, since we are all of the opinion that the plaintiffs are entitled to a decree whether these proceedings vested a legal title in Greeley or not. Greeley, Gale & Co. had a legal claim against Adolph Wehrman upon a judgment lawfully obtained against him in Wisconsin. Upon the basis of this judgment they brought suit against

him in Iowa, sued out a writ of attachment, and levied it upon the lands in question.

Admitting that the writ was not impressed with such a seal as the law required, it was not, under the circumstances, void upon that ground. O'Brien county was not organized as an independent county until February 6, 1860. The writ was issued January 14, 1861. The county offices being evidently not yet in a complete working condition, the clerk affixed an ordinary private seal or scroll to the writ, with a statement that no seal had yet been procured. Granting that a failure to use an engraved seal actually provided would avoid the writ, certainly the clerk was entitled to a reasonable time to procure such seal. In the meantime, however, the rights of suitors and of the public ought not to be prejudiced by the lack of one. The whole civil and criminal business of the county ought not to come to a stop simply through the failure of its officers to provide it with a seal. As was justly observed by the learned judge of the Circuit Court: "The only purpose of the seal is to authenticate the issuance of the writ. May not such authentication be furnished in other ways, if for any reason the court is without an engraved seal for a time? Suppose that to-day the engraved seal of O'Brien county should be destroyed or stolen, must all the judicial proceedings therein be brought to a stand-still, awaiting the procurement of another engraved seal? Would not this be subverting substance to mere form? Would it not be permissible for the court to continue the issuance of writs of attachment and execution, having attached thereto a scroll as a seal, the writ on its face showing the reason thereof?"

While the clerk does not seem to have used any great diligence in procuring a seal, his laches in that particular cannot be made the subject of inquiry here. The fact that no engraved seal had been procured is a sufficient excuse for the purpose of the case. The sheriff, by virtue of this writ, made a levy upon the lands in question, indorsed such

levy upon the writ and caused personal notice to be served upon the defendant Wehrman in the state of Wisconsin, January 25, 1861.

It is also true that the petition for the attachment described the judgment sued upon as having been rendered on May 12, 1860, when in fact it was not rendered until September 12; that the writ was made returnable upon a day which had not been fixed as the first day of the next term of the court, though it was subsequently fixed upon that day; and that, in changing the venue of the action to Woodbury county, the transcript of the record was sent to such county without being certified by the seal of the court in which the suit was brought. While these might have been good defenses to the action if seasonably interposed, they do not render the writ and all the proceedings thereunder void. Indeed, it is at least doubtful whether, if no notice at all had been served upon Wehrman, the lien of the attachment would have thereby been lost. The object of the notice is to apprise the defendant of the commencement of the suit, and to call him in to defend and prevent the plaintiff from obtaining judgment, if he can. The object of the writ, which is issued *ex parte*, is to enable the plaintiff to obtain a lien upon the land, which may be subsequently enforced by a sale upon execution, if judgment be obtained. If notice were actually served upon the defendant in Wisconsin, as claimed, it is difficult to see why the judgment subsequently entered up was not valid as against the land attached, though, of course, not against the defendant *in personam*.

Whether the subsequent proceeding by bill to set aside the deed from Adolph to Frederick Wehrman was invalid or not it is unnecessary to inquire. The attachment and subsequent long-continued possession thereunder vested an interest in the present plaintiffs which was amply sufficient as a basis for this bill. If, as is claimed, the decree in the Chancery Court was void because no personal service

was obtained upon defendant Wehrman within the state of Iowa, there is greater reason why jurisdiction of the present bill should not be declined, since the object of this bill is practically the same as the other, viz., to obtain the benefit of the attachment proceedings. If personal service were obtained in the state of Wisconsin, we see no objection to the decree as rendered, since the Code of Iowa (§§ 2831, 2835) permits personal service, or service by publication, upon defendants out of the jurisdiction "in an action for the sale of real property under a mortgage lien or other incumbrance or charge;" and such statutes have been upheld by this court: *Arndt v. Griggs*, 134 U. S. 316. If no proper service were obtained, then we are able to do in this suit what was ineffectually attempted there.

The salient and decisive facts of this case are that Greeley, Gale & Co. obtained, or at least attempted to obtain, a lien upon this land by virtue of their attachment; that personal service in such proceeding was made upon Adolph Wehrman, in the state of Wisconsin, January 25, 1861; that they went through the form of obtaining a judgment against these lands and selling them upon execution; that Greeley purchased these lands upon such sale, paid taxes thereon, acquired tax titles thereto, and subsequently sold the same, and that plaintiffs in this suit became the purchasers; that they immediately took possession of the same; and that they and their grantors have been in open, notorious and undisturbed possession for twenty-seven years, have built a house and other buildings, and made other improvements thereon; that Frederick Wehrman, the defendant herein, took title to these lands December 17, 1859, the very day that suit was originally begun against Adolph; that the deed was made to him under circumstances tending strongly to show that it was intended as a fraud upon the creditors of Adolph Wehrman; that he took no steps to assert his title or right of possession to these lands, but practically abandoned the same, until, by the increase of

population and the settlement of the country, they had become of material value. Whether he had actual notice of the chancery suit or not, it is highly improbable that if he had been a *bona fide* purchaser of these lands lying in another state, for which he had paid, or agreed to pay, \$3,000 (almost double their actual value), he would have taken no steps for nearly thirty years to assert his right thereto. Particularly is this so in view of the fact that he was only an ordinary day laborer at the time he took the deed, having only a few farming implements and a meagre supply of household goods, and, as one of the witnesses expressed it, could not have borrowed without security one-tenth of the sum he purported to have paid for the property. Evidently he was not a man to invest \$3,000 in wild lands and turn his back upon them for twenty-seven years. As was said by this court in *Underwood v. Dugan*, 139 U. S. 380, 384: "Ownership of property implies two things: First, attention to it; second, a discharge of all obligations, of taxation or otherwise, to the state which protects it. When it appears that one who now asserts a title to property, arising more than the lifetime of a generation ago, has during all these years neglected the property, and made no claim of title thereto, a reasonable presumption is that, whatever may be apparent on the face of the instrument supposed to create the title, were the full facts known, facts which cannot now be known by reason of the death of the parties to the transaction, it would be disclosed that no title was in fact obtained; or, if that be not true, that he considered the property of such little value that he abandoned it to the state which was protecting it." Considering all the facts of this case, it is not a matter of surprise that, when charged in this bill with having received his deed without consideration, and with intent to defraud the creditors of his brother Adolph, the defendant should not have been called to testify in relation to the transaction. In short, it

would be difficult to conceive of a clearer case of estoppel *in pais*.

The decree of the court is therefore affirmed.

When an obstruction is fraudulently interposed to the obtaining of satisfaction of a judgment at law, a judgment creditor may at once come into equity, after he has obtained a lien upon the property which it is sought to fraudulently guard against execution, and obtain a decree removing the obstruction: *Angel v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Cuyler v. Moreland*, 6 Paige, 273; *Beck v. Burdett*, 1 Ib. 305; accordingly a fraudulent conveyance will on the complaint of a lien creditor, be set aside or canceled: *Traip v. Gould*, 15 Me. 83; *Dockray v. Mason*, 48 Ib. 178; *Hamlin v. McGillicuddy*, 62 Ib. 269; *Planters & M. Bank v. Walker*, 7 Ala. 926; *Dargan v. Waring*, 11 Ib. 988; *Waddell v. Lander*, 62 Ib. 347; *Sheafe v. Sheafe*, 40 N. H. 516; *Cook v. Johnson*, 12 N. J. Eq. 52; *Sockman v. Sockman*, 18 Ohio, 468; *Beaumont v. Herrick*, 24 Ohio St. 256; *Gormley v. Potter*, 29 Ib. 599; *Musselman v. Kent*, 33 Ind. 452; *Fowler v. McCartney*, 27 Miss. 510; *Beach*, Mod. Eq. Juris., § 883; *Petree v. Brotherton*, 132 Ind. 692; *Scanlan v. Murphy*, 51 Minn. 536; *Martin v. Atcheson*, 2 Wash. 590; *Paulson v. Ward* (N. Dak.), 58 N. W. 792; *Bacar v. Harris*, 62 Fed. Rep. 99; *Rozek v. Redzinski* (Wisc.), 58 N. W. 262; *Quinn v. People*, 45 Ill. App. 547; *State v. Bowen*, 38 W. Va. 91.

The creditor may resort to equity, although he has a remedy at law, where the latter remedy is not in all respects so plain and satisfactory as the remedy in equity: *Boyce v. Grundy*, 3 Pet. 210; *Mann v. Appel*, 31 Fed. Rep. 378; *Klosterman v. Mason County*, 8 Wash. 281; *Mississippi Mills v. Cohn*, 150 U. S. 202.

And there may be cases in which a creditor may maintain a bill to set aside a fraudulent conveyance even before obtaining a judgment: *National Tradesman Bank v. Wetmore*, 124 N. Y. 241; although as a rule it is necessary that a judgment must have been obtained.

Equity jurisdiction—Reformation of deed.**BURRTON LAND AND TOWN COMPANY v. HANDY
ET AL.**

(Supreme Court of Kansas, July 6, 1894.)

The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake.

Where a grantee purchased from a grantor a fractional eighty-acre tract of land subject to the right of way of the Union Pacific Railway Company, which, under an Act of Congress, was four hundred feet in width, but the parties did not actually know the width of the right of way, and the conveyance, without conforming to the intent of the parties, included the right of way with covenants of general warranty, *held*, that the grantor was entitled to have the deed reformed so as to except therefrom the right of way, to which he had no title.

(Syllabus by the court.)

Error from District Court, Ellsworth county.

Action by Jerome B. Handy against the Burrton Land and Town Company and the Ellsworth Loan and Investment Company. Judgment for plaintiff and for the Ellsworth Loan and Investment Company. The Burrton Land and Town Company brought error.

On April 2, 1888, Jerome B. Handy commenced his action against the Burrton Land and Town Company and the Ellsworth Loan and Investment Company to recover \$1,662.50 upon a promissory note executed to Ruth A. Tarr on the 21st of May, 1887, with interest at eight per cent. from that date, by the Burrton Land and Town Company, which note was afterwards transferred and assigned to the plaintiff, and also to foreclose a mortgage upon the north half of the southeast quarter, and the south half of the northeast quarter, of section 19, township 15, range 8,

in Ellsworth county, executed by the land and town company to Mrs. Tarr to secure the note. The petition further alleged that the Ellsworth Loan and Investment Company claimed an interest or lien upon the mortgaged premises, but that the same was inferior to plaintiff's lien. The Ellsworth Loan and Investment Company, having obtained a similar note from Mrs. Tarr, filed its answer and cross petition, praying for judgment upon the note held by it, and also to foreclose the mortgage given to secure the same. The notes were given by the land and town company to Mrs. Tarr as part of the purchase price of the real estate purchased of her. After the commencement of this action the Union Pacific Railway Company, in a case brought by it as plaintiff against the parties to this action, in the nature of ejectment, in the District Court, obtained a judgment on April 2, 1889, for two hundred feet of right of way on each side of the centre of its railroad track over and across the real estate purchased, to secure the purchase-money for which the notes were given. Handy, by his amended petition, in addition to the foreclosure of the mortgage, also alleged a mutual mistake in the execution of the deed given by Mrs. Tarr and her husband, Smith R. Tarr, to the Burrton Land and Town Company, and also of the mortgage, and asked to reform the instruments so as to except from the covenants thereof a right of way four hundred feet in width, in favor of the Union Pacific Railway Company, over and across the real estate. The Burrton Land and Town Company alleged in its defense, by way of counterclaim, damages for a breach of the covenants of warranty of the deeds to the land purchased by it from Mrs. Tarr and her husband, in consequence of the railway company being the owner and in possession of four hundred feet of right of way over and across the same. Trial had at the November term of the court for 1889, before the court with a jury. The jury returned a verdict in favor of Handy against the Burrton Land and Town Company for \$1,931.77½.

and also returned a like verdict in favor of the Ellsworth Loan and Investment Company. The jury answered the following questions, submitted upon the part of Jerome B. Handy and the Ellsworth Loan and Investment Company : "Q. At the time the Burrton Land and Town Company purchased the fractional 'eighty' in controversy, was the same occupied by the Tarrs, and used for farming and grazing purposes? A. It was. Q. At the time of the purchase of the land in controversy was it well known and understood between the parties to such purchase and sale that the railroad ran through the fractional eighty? A. It was. Q. At the time of the purchase of the fractional eighty was it discussed and understood that the Union Pacific Railway Company had a right of way through said fractional eighty? A. It was. Q. Did the Burrton Land and Town Company purchase the said fractional eighty with the understanding and belief that they were buying the same subject to a right of way through the land? A. It did. Q. Did Ruth A. Tarr and Smith R. Tarr each sell the land with the intention of selling the same subject to the right of way through said eighty? A. They did. Q. Did the Burrton Land and Town Company make a proposition to the Tarrs that they would give \$5,000 for the fractional eighty and blocks thirty-one and thirty-two in Minnick's Addition, subject to the right of way of the Union Pacific Railway Company through fractional eighty? A. They did. Q. If you answer the last question in the affirmative, then state if the amount of such right of way was not unknown or undetermined upon by the parties. A. It was unknown and undetermined. Q. Did the Tarrs accept the proposition to sell the land subject to the right of way of the Union Pacific Railway Company? A. They did. Q. If you answer the last question in the affirmative, was there any new contract between the parties, that the Tarrs accepted, other than the proposition of the said Burrton Land and Town Company as stated in question six?

A. There was none. Q. If you allow the Burrton Land and Town Company damages in this case, then state how much, if any, damages you allow by reason of the right of way passing over a portion of block thirty-two. A. \$100. Q. If you allow the Burrton Land and Town Company damages in this case, please state how much, if any, you allow by reason of the four hundred feet right of way through the fractional eighty. A. None, as it was bought subject to the railway right of way." The jury also answered the following questions, submitted by the Burrton Land and Town Company: "Q. For what purpose did defendant buy the land in question? A. For platting. Q. Did defendant know that the Union Pacific Railway Company owned a right of way one hundred feet wide through the fractional eighty-acre tract at the time it purchased the land? A. An undetermined width. Q. If you answer the last question yes, please state, then, who told them so. A. By general discussion at the time. Q. Did Ruth A. Tarr, or any of her agents, inform defendant, at the time of said purchase, there was a hundred feet right of way through said land? A. Informed them that there was one of an undetermined width. Q. Did defendant ever agree with Ruth A. Tarr that a hundred feet right of way should be excepted out of the covenants of the deed? A. No, not with Ruth A. Tarr in person, but with her agent, E. W. Wellington, of a right of way of undetermined width. Q. If you say yes to the last question, state when, where and by whom said agreement was made. A. At the time of sale, on or near the premises, by her agent, E. W. Wellington, and the representatives of the Burrton Land and Town Company. Q. Did defendant have any knowledge, when they bought the land in question, that the Union Pacific Railway Company owned or claimed to own, a four hundred feet right of way through said land? A. According to evidence, the width of the right of way was not known. Q. Did defendant and Ruth A. Tarr ever

agree that a four hundred feet right of way should be excepted out of the covenants of the deed for said lands? A. No, not with Ruth A. Tarr in person, but with her agent, E. W. Wellington, of a right of way of undetermined width. Q. If you say yes to the last question, state when, where and by whom the agreement was made. State specifically. A. At the time of sale, on or near the premises, by her agent, E. W. Wellington, and the representatives of the Burrton Land and Town Company. Q. How much land is there in the tract purchased by defendant, outside of the two blocks or in the fractional eighty-acre tract? A. Eighty acres, more or less, subject to whatever right of way the railroad company had. Q. How much land is there in the four hundred feet strip from which the Union Pacific Railroad Co. has ejected defendant since its purchase? A. Evidence shows that there is twenty-four and a fraction acres. Q. What portion of the \$5,000 was agreed to be paid for this fractional eighty-acre tract? A. \$3,000. Q. What was the expense of the defendant in regard to the action brought by the Union Pacific Railway Co. for the right of way over the real estate in question? A. From the evidence, and our instructions, we believe that there is nothing due said defendant." Subsequently judgments were rendered upon the verdicts, and a decree entered for the foreclosure of the mortgage as prayed for. The Burrton Land and Town Company excepted and appealed.

Jetmore & Jetmore, for plaintiff in error.

Ira E. Lloyd, for defendants in error.

HORTON, C. J. (after stating the facts).—The principal question involved in this case is whether the deed executed by Ruth A. Tarr and her husband, Smith R. Tarr, to the Burrton Land and Town Company, on or about the 20th of May, 1887, purporting to convey the following premises, situate in Ellsworth county, in this state, to wit: "All that portion of the north half of the southeast quarter and the

south half of the northeast quarter, of section nineteen, township fifteen, south of range eight, west of sixth principal meridian, lying north of the centre of the Smoky Hill river, being eighty acres, more or less," may be reformed so as to except the right of way of the Union Pacific Railway Co. over the premises described in the conveyance. The deed contains covenants of general warranty. The right of way of the railway company contains two hundred feet in width on each side of the railroad: 12 Stat. 491, § 2. At the time of the purchase of the land from the Tarrs the railway was in operation, and the land and town company must be presumed to have purchased with full notice thereof. The evidence and findings of the jury show that the land and town company submitted two propositions to the Tarrs to buy the land—one proposition being to measure the tract and deduct the amount of land taken by the right of way and the river, and pay \$65 an acre for the land remaining, the other proposition being to pay \$3,000 for the land, without measurement, subject to the right of way of the railway company. The Tarrs accepted the last proposition. The deed was executed, but omitted to make any exception of the right of way. The complications in the case grew out of the fact that the width of the right of way seems to have been unknown to all the parties at the time of the conveyance, yet the railway, which was constructed under the provisions of the Act of Congress of July 1, 1862, providing for a railroad and telegraph line from the Missouri river to the Pacific ocean, was entitled to a right of way to the extent of two hundred feet in width on each side of its road, where it passed over public land. The evidence is sufficient to show that the land and town company purchased the land subject to the right of way. We think it is immaterial in this case whether the right of way was known at the time to be fifty feet, one hundred feet or four hundred feet. All of the parties had the same knowledge as to the width of the right of way as the other. The Tarrs did

not intend to convey and warrant the title to the right of way, and the land and town company did not expect to purchase and obtain a good title to the same. Before the purchase there was much discussion among the parties as to the extent of the right of way. The secretary and general manager of the land and town company figured out that one hundred feet of right of way would take something over six acres of the land, and when the offer of \$3,000 was made for the eighty-acre tract and \$1,000 each for the two blocks the right of way was taken into consideration. The counsel for the land and town company admit that, if the right of way had been only one hundred feet in width, there would have been no trouble between the parties. This is a concession that the company did not, in its purchase, expect to obtain a good title to the right of way. That the Tarrs did not intend to convey and warrant the title to the right of way of the railway company; that the land and town company knew that there was a right of way of the railway upon the land; that it made its offer in view of such right of way, and purchased the land subject to the right of way, are sufficient, in our opinion, to permit a reformation of the deed, and relieve the Tarrs from any damages for the breach of their covenants of warranty, on account of their want of title to the right of way. The covenants of warranty were never intended by the Tarrs to embrace the right of way, and the land and town company did not purchase the land with that understanding. The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake: 2 Pom. Eq. Jur., § 843; *Benson v. Markoe* (Minn.), 33 N. W. 38; *Canedy v. Marcy*, 13 Gray, 373; *Stedwell v. Anderson*, 21 Conn. 139; *Clayton v. Freet*, 10 Ohio St. 544. The evidence

shows that the land and town company knew that the right of way was four hundred feet in width, a few weeks after its purchase of the land, yet, with full knowledge of this, the general manager of the company, in the fall of 1887, wrote several letters promising to pay the notes, but wanting time. This evidence was properly received, as tending to show that the company accepted the deed subject to the right of way, and made no complaint when it learned that the width was four hundred feet instead of fifty or one hundred feet. In view of the special findings of the jury, and the evidence supporting the same, the other alleged errors concerning the evidence of the eighty-acre tract of land are immaterial. The two blocks of land purchased for \$1,000 each were conveyed by a separate deed. It does not appear from the evidence that these blocks, or either of them, were conveyed or accepted subject to any right of way; therefore the jury properly allowed \$100 damages, on account of the breach of the covenants of warranty in the conveyance of block thirty-two. The land and town company had some expenses in defending the action brought by the Union Pacific Railway to eject it from a part of block thirty-two. One witness testified that \$75 or \$100 was paid in looking up the matter. On account of this evidence \$100 will be allowed as additional damages, to be deducted from the judgment rendered. The judgment will be modified accordingly. All the justices concurring.

Reformation of an instrument, based on the mutual mistake of the parties thereto, is a well-recognized head in equity: *Durant v. Durant*, 1 Cox, 58; *Calverley v. Williams*, 1 Ves. Jr. 210; *Cannon v. Collins*, 3 Del. Ch. 132; *Bradford v. Union Bank*, 13 How. 66; *Gwyer v. Spaulding*, 33 Neb. 573; *Henkle v. Royal Ass. Co.*, 1 Ves. 314; *Lanyon v. Martin*, L. R. 13 Ir. 297; *Gun v. McCarthy*, Ib. 308; *Price v. Ley*, 4 Giff. 235; *Gump's Appeal*, 65 Pa. 476; *Babcock v. Wyman*, 19 How. 289; *Loss v. Obry*, 22 N. J. Eq. 55; *Minot v. Tilton*, 64 N. H. 618;

Huss v. Morris, 63 Pa. 372; *Elk Co. v. Early*, 18 Atl. 602; *Story Eq. Jur.*, §§ 152, 153, 155. Before equity will interfere by way of reformation, the evidence of mistake and of what the parties really intended must be clear and establish the facts relied on for relief beyond reasonable controversy: *Story Eq. Jur.*, § 152; *Shelburne v. Michigan*, 1 Bro. Ch. 338; *Davis v. Symonds*, 1 Cox, 404; *Townsend v. Stangroom*, 6 Ves. 332; *Gillespie v. Moon*, 2 John. Ch. 585; *Lyman v. United Ins. Co.*, Ib. 630; *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 442; *Martin v. Pycroft*, 2 De G., M. & G. 785; *Woollam v. Hearn*, 7 Ves. 217; *Dean v. Venly*, 17 W. R. 567; *Darnley v. Proprietors*, L. R. 2 H. of L. 43; *Edmand's Appeal*, 59 Pa. 220; *Mosby v. Wall*, 23 Miss. 81; *Tilton v. Tilton*, 9 N. H. 385; *Philpot v. Elliot*, 4 Md. Ch. 273; *Kern v. Middleton*, 24 W. N. C. 393; *Bodwell v. Heaton*, 40 Kan. 36. The mistake must be mutual: *Ludington v. Ford*, 33 Mich. 123; *Paine v. Jones*, 73 N. Y. 193. Deeds may be reformed by the insertion of what has been omitted from the grant: *Wasatch Mining Co. v. Crescent Mining Co.*, 148 U. S. 293; *Elwood v. Stewart*, 5 Wash. 736; *Monterey County v. Seeglekin* (Cal.), 36 Pac. 515. A change of a grant from "three-fifths" to "four-fifths," when the latter was the amount intended to be conveyed, although both parties knew the words of the deed were "three-fifths," and thought them sufficient to carry what was intended to be conveyed, has been made: *Parish v. Camplin* (Ind.), 37 N. E. 607; so a deed will be reformed by striking out an interpolation, which limits the grant, contrary to the true intent of the parties: *Pulaski Iron Co. v. Palmer*, 89 Va. 384. The reformation may also be by way of reducing the grant in the deed or by qualifying it, as where the deed calls for more land than is included between the monuments with reference to which as boundaries the parties contracted: *Goode v. Riley*, 153 Mass. 585; (but it was held, in *Meade v. Norfolk & W. R. Co.*, 89 Va. 296, that a deed for a right of way for a railroad would not be reformed because it omitted a provision for passage-way at a certain point, the omission being due to representations of the defendant's agents, who had no authority to bind it, that the provision was unnecessary because the plan of the road showed a trestle at that point). A deed may be reformed by inserting the reservation of a right of way, *Fischer*

v. Laack, 85 Wisc. 280, and by the insertion of a provision, in the grant of a gravel pit to a gravel road company, for a reversion after the gravel in said pit has been removed: *Com'rs of Hamilton County v. Cruens* (Ind.), 37 N. E. 602.

Mortgage—Power to mortgage—Attorney-in-fact—Subrogation—Volunteers.

MARY W. CAMPBELL *v.* FOSTER HOME ASSOCIATION.

(Supreme Court of Pennsylvania, October 1, 1894.)

[Reported 163 Pa. 609.]

The rule that a power to sell includes a power to mortgage does not apply to a mere letter of attorney with a naked authority to sell, uncoupled with any interest in the land or fund.

By an instrument in writing the owner of land constituted and appointed another person her true and lawful attorney for her and in her name "to grant, bargain and sell in fee simple all real estate owned by her, including all ground-rents, on such terms and for such prices as he may see fit, and to make, execute and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties or with said ground-rents." *Held*, that the attorney-in-fact had no power to execute a bond and mortgage in the name of his principal.

Letters of attorney are strictly interpreted, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.

Subrogation will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of the party who, on some sort of compulsion, discharges a demand against a common debtor.

An attorney-in-fact, under a letter of attorney giving him a mere power to sell, executed a mortgage in the name of his principal for \$7,500, upon land already covered by a mortgage for \$6,000. The mortgagee retained \$6,000, and paid off the first mortgage, paying over to the attorney the remaining \$1,500. *Held*, that the mortgagee, on the second mortgage

being declared invalid, had no right to be subrogated to the position of the first mortgagee so as to recover the \$6,000 paid in extinguishment of the first mortgage.

Argued March 20, 1894. Appeal, No. 168, Jan. T., 1894, by defendant from decree of the Court of Common Pleas, No. 4, of Philadelphia county. June T., 1892, No. 507, on bill in equity. Before STERRETT, C. J.; GREEN, MCCOLLUM and FELL, JJ.

Affirmed.

Bill in equity for cancellation of mortgage. The master, A. J. D. Dixon, Esq., reported as follows:

"The bill and amendments aver:

"That plaintiff is the owner in fee simple of premises No 1039 Walnut street, in the city of Philadelphia.

"That on December 26, 1888, plaintiff executed a letter of attorney to one William B. Robins, of said city, as follows: 'Know all men by these presents, that I, Mary W. Campbell, of the city of Philadelphia, widow, do make, constitute and appoint William B. Robins, of said city, attorney-at-law, my true and lawful attorney, for me and in my name to grant, bargain and sell in fee simple, all real estate owned by me, including all ground-rents, on such terms and for such prices as he may see fit, and to make, execute and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties, or with said ground-rents; and also to assign, transfer, and set over to any purchaser or purchasers thereof a certain bond and mortgage, bearing date the 14th day of September, A. D. 1882, recorded in mortgage book J. O. D. No. 42, page 469, etc., given and executed by Henry Birchell and wife to the Fidelity Insurance, Trust and Safe Deposit Company, trustees, etc., and assigned to me, the said Mary W. Campbell, by assignment bearing date the 5th day of October, A. D. 1887, recorded in assignment of mortgage book No. 61, page 548, etc., for the sum of \$2,000, secured

upon all that certain lot or piece of ground situate on the east side of Third street, at the distance of ninety-five feet eight inches northward from the north side of Christian street, in the city of Philadelphia; containing in front or breadth on said Third street, nineteen feet ten and one-half inches, and extending of that width in length or depth eastward, ninety-one feet three inches; and also to assign all of the policies of insurances held as collateral for said mortgage. With power also an attorney or attorneys under him for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that the said attorney or substitutes shall do therein by virtue of these presents.' Duly acknowledged December 26, 1888, and recorded at Philadelphia, May 6, 1889, in letter of attorney book No. 71, page 144, etc.

"That on June 10, 1888, plaintiff executed a subsequent letter of attorney to said William B. Robins, as follows:

" 'Know all men by these presents, that I, Mary W. Campbell, do make, constitute and appoint William B. Robins my true and lawful attorney, for me and in my name to make, execute and deliver to the Western Saving Fund Society, a bond and mortgage for the sum of \$6,000, for three years with interest at five per cent. per annum, on premises No. 1039 Walnut street, in the city of Philadelphia, said bond and mortgage to contain all the covenants and conditions now usually contained in bonds and mortgages, and also to receive the money for said bond and mortgage, and to assign any policies of insurance on said premises to said mortgagees as collateral security, and to make any agreements to extend said mortgage or any other mortgages held by me, with power also an attorney or attorneys under him for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that the said attorney or substitute or substitutes shall do therein by virtue of these presents.' Duly acknowledged June 10, 1889, and recorded at Philadelphia,

June 20, 1889, in letter of attorney book No. 71, page 408, etc.

"That the said William B. Robins, under the pretended authority of the first recited letter of attorney of December 26, 1888, executed on December 26, 1890, in the name of plaintiff, a bond and mortgage for \$7,500 on said premises to said defendant, recorded, etc.

"That plaintiff gave no power or authority to said William B. Robins to give any bond for her or to mortgage the said property (except as contained in the second recited letter of attorney) and avers that the said bond and mortgage are not her acts and deeds.

"That if there was any power to mortgage said premises in the first letter of attorney of December 26, 1888, it was revoked by the giving of the subsequent letter of attorney of June 10, 1889, and that, therefore, no power or authority existed in said Robins to make any mortgages upon said premises, except under and in accordance with said last mentioned letter of attorney.

"That plaintiff had no knowledge of said action of William B. Robins in giving said bond and mortgage until a few days before filing her bill; that she has not received the consideration money of said bond and mortgage, but that the said William B. Robins has appropriated the same to his own use.

"That previously to the making of said bond and mortgage to defendant, the said William B. Robins, under the pretended authority of said first recited letter of attorney, made two other bonds and mortgages of the said premises to the Western Saving Fund Society—one dated June 20, 1889, for \$6,000, recorded in mortgage book G. G. P. No. 480, page 22, and the other dated May 9, 1890, for \$500, recorded in mortgage book G. G. P. No. 597, page 71. These two mortgages were satisfied of record December 31, 1890, after making of the mortgage to defendant; and that the fact that these mortgages to the

Western Saving Fund Society had been made by the said Robins, claiming to act under said first letter of attorney, was known to defendant at the time the mortgage for \$7,500 was made to it by the said Robins.

"That even if the first-mentioned letter of attorney of December 26, 1888, was sufficient to authorize said William B. Robins to mortgage the said premises in the first instance, the power and authority to do so was exhausted by the making of the said mortgages to the Western Saving Fund.

"The prayers of the bill were: (1) For a decree that said bond and mortgage were not the acts of plaintiff, and that they be delivered up to be canceled and marked satisfied of record. (2) That an injunction may issue restraining defendants from proceeding against plaintiff upon said bond and mortgage. (3) General relief.

"The answer admits plaintiff's ownership of said property; the execution of said letters of attorney; the execution of said bond and mortgage; avers that the authority of Robins was real and not pretended, and that the said bond and mortgage are the acts and deeds of plaintiff; asks that the want of knowledge on the part of plaintiff be proved if material, and avers that some part of the moneys obtained by Robins upon the bond and mortgage was appropriated to the benefit of the plaintiff; admits the execution of the two prior mortgages to the Western Saving Fund, but denies that Robins acted only under the authority alleged in making said two mortgages, and avers that said mortgage of \$6,000 was made by Robins, acting *inter alia* under the second letter of attorney of June 10, 1889; avers that said two mortgages of \$6,000 and \$500 were valid incumbrances upon said premises, and that the moneys received from defendant upon the bond and mortgage for \$7,500 were appropriated in and about the payment of said two mortgages and claims to be entitled in any event to hold said mortgage of \$7,500 to the extent of said

appropriation; denies that there was any revocation or exhaustion of the first letter of attorney (of December 26, 1888), and prays to be dismissed with costs.

"FINDINGS OF FACT.

"From the admissions in the pleadings and the proofs produced the master finds the facts to be as follows:

"The plaintiff, Mary W. Campbell, being the owner in fee simple of premises No. 1039 Walnut street, Philadelphia, made and executed the letters of attorney of December 26, 1888, and June 10, 1889, as set out in the pleadings. The said William B. Robins claiming to act as attorney-in-fact of Mary W. Campbell, thereupon made and executed in her name bonds and mortgages of her said premises, No. 1039 Walnut street, as follows:

"1. June 20, 1889. Bond and mortgage to the Western Saving Fund for \$6,000; reciting both letters of attorney; satisfied of record December 31, 1890. (This bond and mortgage were produced, and upon inspection the recital of the second letter of attorney appeared to have been inserted in both bond and mortgage, but was not noted as having been so inserted before execution.)

"2. May 9, 1890. Bond and mortgage to the Western Saving Fund for \$500; reciting the power as one of June 20, 1889, recorded in letter of attorney book No. 71, page 144 (the date of the second letter of attorney, but the record of the first letter of attorney, December 26, 1888); satisfied of record December 31, 1890.

"3. December 31, 1890. Bond and mortgage to defendant (being the subject of this suit), reciting the first letter of attorney.

"4. July 25, 1891. Bond and mortgage to the No. 2 Assistance Building and Loan Association for \$1,500. (This is still subsisting, and is the subject of a similar proceeding before the master.)

"The plaintiff, Mary W. Campbell, had no knowledge of

the making of any mortgages in her name by William B. Robins until she received the information from her counsel, Thomas Hart, Jr., Esq., in a letter from him dated June 20, 1892.

"No part of the moneys obtained by Robins upon said bond and mortgage for \$7,500 reached the hands of plaintiff.

"Of the \$7,500, the amount of said mortgage, the sum of \$6,000 was appropriated to the payment of the aforesaid mortgage of the Western Saving Fund (which is admitted to have been a valid incumbrance on said premises); \$253.07 to the payment of interest thereon and satisfaction fee; \$500 to the payment of the other aforesaid mortgage of the Western Saving Fund; \$17.06 to the payment of interest thereon and satisfaction fee; \$230.88 to the payment of taxes for 1890 on said premises; \$3.50 to recording, and the balance, \$494.99, was paid to William B. Robins, attorney, who appropriated the same to his own use.

OPINION.

"The following questions arise in this case: (1) Whether under the letter of attorney of December 26, 1888, there was any power to mortgage. (2) Whether the giving of the special letter of attorney of June 10, 1889, revoked the former power, not only as to the property therein named, No. 1039 Spruce (*sic*) street, but also as to all the other properties. (3) Whether both the said letters of attorney were not exhausted by the making with the knowledge of the present mortgagees of the former mortgages of the several properties. (4) The application of the doctrine of subrogation.

"Upon the first and main point we are confronted at the outset with a line of cases in Pennsylvania in which the general proposition that a 'power to sell includes a power to mortgage,' is affirmed and reaffirmed in the most positive terms. These cases are: *Lancaster v. Dolan*, 1 Rawle, 231; *Gordon v. Preston*, 1 Watts, 385; *Duval's Appeal*, 38 Pa.

112; Penna. Co. for Ins. on Lives, etc., *v. Austin*, 42 Pa. 257; *Zane v. Kennedy*, 73 Pa. 182; *Watts's Appeal*, 78 Pa. 370; *Maurer's Appeal*, 86 Pa. 380; *Wurfflein v. Haines*, 14 W. N. C. 76 and 15 W. N. C. 28; *McCreary v. Bomberger*, 151 Pa. 323."

After reviewing these cases the master continued:

"The foregoing are all the cases in Pennsylvania on the subject; a careful examination of them reveals the fact that it is only under the existence of certain circumstances that the assertion, 'A power to sell includes a power to mortgage,' becomes a 'rule of property' in Pennsylvania. Two of them are cases of corporations, the others are all cases of trusts, some testamentary, others created by deed; they are cases of *ancillary* powers, powers for the purpose of carrying out or aiding in the object for which the trust was established. The present case, on the other hand, is that of an agent, of course with no trust, with no right to hold this property or do anything with the purchase-money in case of a sale, but to hand it over to his constituent. Can it be said that he has an implied power to mortgage, because of the authority of cases based upon a trust, based upon a discretion in the donee of the power as to the means of raising money, when the object and purpose of the trust was to raise money, and who was also to be the hand which would devote the money subsequently to the purposes of the trust, either to pay debts or legacies, or something of that nature?

"While the cases in Pennsylvania, as will be shown, have gone further than any others upon the subject of an implied power to mortgage, they have not gone so far as to say that an agent, authorized by letter of attorney to sell real estate, has power to mortgage it, and it is submitted that their authority should not be extended by implication to cover such a proposition.

"The case of *Mills v. Banks*, 3 P. Wms. 9, decided in 1724, has been cited as authority for the general principle

that a power to sell includes a power to mortgage. Lord Chancellor MACCLESFIELD said, in his opinion, 'a power to sell implies a power to mortgage, which is a conditional sale' (*i. e.*, because it is a conditional sale?), but gave no attendant authority for the statement, nor is any to be found. This case has been distinctly departed from in a line of cases, viz.: *Ball v. Harris*, 4 Myl. & C. 264; *Haldenby v. Spofforth*, 1 Beav. 390; *Stroughill v. Austey*, 1 De G., M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *De Vayne v. Robinson*, 24 Beav. 86; *Dimmock's Case*, 52 L. T., N. S., 494; covering a period from 1838 to 1885, which have settled the law on the subject in England to be, that when the donee of a power to sell has imposed upon him other rights and duties, the performance of which involves the propriety or necessity of borrowing money, as in case of a trustee to create charges or raise portions, etc., equity will, in aid of such other purposes, construe a power to sell as a power to mortgage, when exercised in support of the trust."

After citing *Ferry v. Laible*, 31 N. J. Eq. 566; *Loebenthaler v. Raleigh*, 36 N. J. Eq. 169; *Hoyt v. Jaques*, 129 Mass. 286; and *Kent v. Morrison*, 153 Mass. 137, the master continues: "I have referred to the English cases, and those of New Jersey and Massachusetts, not for the purpose of showing that the law of *Lancaster v. Dolan* should not be followed in kindred cases, but merely to show that that doctrine should not be extended to include a case like the present one, a case that has not arisen in Pennsylvania, because the original authority cited for the decision in *Lancaster v. Dolan* (*Mills v. Bank*, *supra*) has since been departed from and its doctrine limited and applied to a certain class of cases only.

"The text writers are unanimous in their statements of the law upon this point."

After quoting paragraphs from the following text writers: *Hill on Trustees*, 475; 1 *Sugden on Vendors*, 591; *Sugden*

on Powers, 425; *Ib.*, ch. 8, § 3, pl. 4; Chance on Powers, § 2563; 4 Kent Com. 147, 331; 2 Washb. R. Prop. 708, pl. 5; 1 Fisher on Mort., p. 285; 1 Powell on Mort. 61; 1 Jones on Mort., § 129; 2 Perry on Trusts, § 768; 2 Spence on Eq. Juris. 369; 1 Lewin on Trusts, 426, the master proceeds:

"The law governing the construction of letters of attorney is properly a branch of the law of principal and agent and the doctrine of Pennsylvania law upon the subject of the powers of agents is altogether opposed to the proposition that a power to an agent to sell and convey real estate empowers the agent to mortgage the same. There is no analogy between the cases of powers under wills and deeds and under letters of attorney. Letters of attorney should receive a strict interpretation, and the authority should not be extended by intendment beyond what is given in terms or is absolutely necessary for carrying the authority into effect, and the authority must be strictly pursued.

"ROGERS, J., in *Devinney v. Reynolds*, 1 W. & S. 328, says: 'An agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds his power. A special power must be strictly pursued, and whoever deals with an agent constituted for a special purpose deals at his peril when the agent passes the precise limits of his power.'

"Directly in this line are the following Pennsylvania cases: *Peck v. Harriott*, 6 S. & R. 145; *Strohecker v. Farmers' Bank*, 6 Watts, 96; *Same v. Same*, 8 Watts, 188; *Hefferman v. Adams*, 7 Watts, 116; *Baring v. Peirce*, 5 W. & S. 548.

"The distinction between powers under wills and deeds and under letters of attorney is recognized by Sugden, Powers, ch. 6, 255.

"The power to mortgage can only be placed in the letter of attorney of December 26, 1888, by construction; it is not there in terms, nor is it at all a necessary implication

(*Peck v. Harriott, supra*); no one will say that the power to raise money on mortgage of a property is necessary in order to sell it. The application of the principles of law governing the interpretation of powers between a constituent and an agent strongly disfavors the contention of the defendant in this case.

"Although no case has arisen in Pennsylvania upon the question whether an attorney-in-fact, with power to sell real estate, may mortgage it, that precise point has been decided in other states, in each instance against the right to mortgage (quoting *Wood v. Goodridge*, 6 Cush. 117; *Morris v. Watson*, 15 Minn. 212; *Jeffrey v. Hursh*, 49 Mich. 31, affirmed in *Hursh v. Jeffrey*, 58 Mich. 246; *Hubbard v. Congregation*, 34 Iowa, 31; *Switzer v. Wilvers*, 24 Kan. 384; *Nixon v. Hyserott*, 5 Johns. 58; *Coondoo v. Watson*, L. R. 9 Ap. Cas. 561).

"The text books agree in the statement of law that a power to sell given to an agent does not confer upon him the power to mortgage or pledge: *Mechem on Agency*, § 323; *Story on Agency*, § 68; 1 *Fisher's Law of Mortgages*, p. 260; 1 *Jones on Mortgages*, § 129; *Wharton on Agency*, § 193; *Fitch, Law of Real Estate Agency*, p. 140.

"There is another distinction between this case and the Pennsylvania cases already referred to. In each of them the money raised or received by the trustees was properly received; he who made the mortgage had a right to give a bond accompanying the mortgage for the money given him. But how can it be said that there was any authority given to William B. Robins to borrow money for the plaintiff or to give any obligations binding her?

"A mortgage in Pennsylvania, while in form a conveyance, is nothing more nor less than a security for money loaned or for the performance of some other obligation: *Presbyterian Corporation v. Wallace*, 3 Rawle, 109.

"If the bond which the mortgage secured is bad, if there is no debt, no legal obligation to be secured, how can the

mortgage securing a worthless bond be good? And here it will be seen how little analogy there is between cases quoted *supra* and the present one. In the former the donee of the power was empowered to raise money and of course to give his obligation as a fiduciary. It was because he was empowered to sell in order to raise money to pay debts, legacies or charges, that it was held he might raise money by way of mortgage. The power was to sell to raise money. The implicit power to mortgage was only the means of raising the money. See, as instances: Duval's Appeal, where the mortgage secured money which the trustee borrowed to pay the decedent's debts, one of the objects of the trust and of the power to sell. And Penna. Co. v. Austin, where it is said that the trustee had power to raise money for the legitimate purposes of the trust.

"It will be seen, too, how little analogy there is between cases of executors exercising a power of sale and the present case, when the cases upon the general powers of executors are considered.

"An executor having the power of absolute disposition of the testator's assets, for the general purpose of the will, may, in the exercise of sound discretion, supposing the will does not peremptorily require an absolute sale, raise money required for the estate by a mortgage of the assets: 2 Williams' Executors, 840.

"Of course the estate is bound for a loan made in such a case; and so when he is empowered to sell real estate for the purpose of raising money the obligation which he gives for money raised to pay legacies or debts is a good one. Where, however, the purpose of the executor is to pay his own debt, both the obligation, as against the estate, and the pledge of the testator's assets are bad.

"An executor cannot make a valid sale or pledge of the assets of his testator for the payment of his own or the debts of a third person: Miller v. Ege, 8 Pa. 356; Bayard v. Bank, 52 Pa. 232; Martin's Appeal, 13 W. N. C. 167.

"The present case is like an executor pledging the testator's assets or mortgaging real estate, which he is empowered to sell, for his own debt. In such cases the pledge or mortgage is bad, because the purpose is bad. So here the mortgagee knew the agent had no authority to borrow money for the constituent, and that the obligation which he gave must be worthless.

"A fiduciary with an unlimited power of sale is practically the owner of the estate for every purpose.

"In Pennsylvania a mere naked authority to executors to sell real estate is taken to give them the same power and authority over the estate, for all purposes of sale and conveyance, as if the same had been thereby devised to them to be sold: Act February 24, 1834, § 13, Purd. 521, pl. 78. In all such cases the executor can make binding obligation on the part of the estate for money borrowed for its purposes.

"But where can a case be found deciding that a person having a power to sell real estate, but confessedly no power to borrow money on behalf of the maker of the instrument and therefore no power to oblige him to pay any money, may, under the power to sell, validly mortgage the real estate of the other to secure the worthless obligation?

"In *Wood v. Goodridge*, *supra*, it was pointedly remarked that the power did not in terms give the attorney power to borrow money and bind his principal by a promissory note.

"In *Jeffrey v. Hursh*, *supra*, the court said that there could be no implication from an authority to sell lands that the constituent intended that the agent might charge him with the duties and responsibilities of a mortgage.

"See *Mechem on Agency*, §§ 389-391: 'The power of binding by promissory negotiable notes can be conferred only by the direct authority of the party to be bound. Such a power will be strictly construed. It will only be implied where it is practically indispensable to accomplish the object.'

“Upon the second point, it was contended by counsel for plaintiff that the general power of December 26, 1888, to sell, was even if it could be held to authorize a mortgage of plaintiff's real estate, revoked by the power of June 10, 1889, especially providing for a mortgage of one piece of real estate only to a certain person for a certain sum, the latter power having been recorded before the making of all the mortgages in question except that of \$1,000 to Amelia Priestman upon June 13, 1889: citing *Morgan v. Stell*, 5 Binney, 305.

“And upon the third point it was argued that even if the power of December 26, 1888, to sell real estate was sufficient to authorize the attorney to mortgage the same, that power had, previously to the making of the mortgages in five of these cases, viz.: those of the Foster Home Association, Margaret C. Agnew, the Real Estate Title Company and the Assistance Building and Loan Associations Nos. 1 and 2, been exhausted by the making of former mortgages of the same property, the fact of the making of the preceding mortgages having been known to the mortgagees now claiming: citing *Slifer v. Beates*, 9 S. & R. 166; *Elliott's Case*, 5 Whart. 523; *Asay v. Hoover*, 5 Pa. 21; *Maurer's Appeal*, 86 Pa. 380; *Denny v. Lyon*, 38 Pa. 98; *Swift's Appeal*, 87 Pa. 502; *Saunders v. Evans*, 8 H. L. Cases, 720; *Sugden on Powers*, ch. 8, § 3, pl. 10.

“One other important point was argued before the master. It was claimed by counsel for defendant that supposing their contention as to the power to mortgage to be erroneous, a certain amount of the money obtained by Robins went to pay good obligations in the shape of liens or incumbrances on the property of plaintiff and that therefore defendants were entitled to be subrogated to the extent of that amount, claimed to be \$7,446.75 in the six cases and that the mortgages should be held available for the purpose of enabling defendants to get back that money. . . .

“The right of subrogation has been called the mode

which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it: Beach on Modern Equity Jurisprudence, § 800.

"And in the same authority at § 801, it is said that a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. In such case the payment operates as the absolute discharge of the debt so paid.

"Maurer's Appeal, 86 Pa. 380, relied upon by defendants, was somewhat different from this case. In the first place, Judge SHARSWOOD says: 'The plaintiffs loaned their money in good faith, in the belief that the deed of trust was revoked, and that the mortgagors had a perfect right to make the mortgage.' But the great distinction is that the married woman herself received the money from the plaintiffs, and herself applied it to the payment of the preceding mortgage. In the present case the plaintiff had nothing to do with the payment nor any knowledge on the subject. It is the case of a volunteer loaning money on a worthless security, some of which went to pay off a good mortgage.

"It is held in Webster & Goldsmith's Appeal, 86 Pa. 409, that while subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party, who, on some sort of compulsion, discharges a demand against a common debtor. These principles do not apply in favor of volunteers; they can obtain the right of substitution only by contract: Mosier's Appeal, 56 Pa. 76; Hoover v. Epler, 52 Pa. 522; Wallace's Estate, 59 Pa. 406.

"One who discharges an incumbrance upon property which he has no interest in having relieved, is not thereby subrogated to the rights of the holders of the incumbrance: Moody v. Moody, 68 Me. 155; Wolff v. Walter, 56 Mo. 292.

"And the loaning of money to discharge a lien does not

subrogate the lender to the rights of the lien holder: Beach on Modern Equity Jurisprudence, § 801, and cases cited in note 2.

“Voluntary payment of the mortgage debt by one who sustains no relation whatever to the property, cannot operate to subrogate him to the rights of the holder of the obligation: Beach on Modern Equity Jurisprudence, § 807.

“So one who loans money to another to pay the mortgage cannot claim the benefit of subrogation to the rights of the mortgagee: Van Winkle v. William, 38 N. J. Eq. 105.

“The Real Estate Title Company who insured the defendants' titles in this and the other cases, and by whom the settlements were made, acted as agent of the defendants and payment by it of the preceding mortgage and of taxes, was payment by the defendants.

“As to any rights existing in Robins to act as agent for plaintiff there was no evidence before the master, save and excepting only as contained in the letters of attorney of December 26, 1888, and July 10, 1889.

“In Maurer's Appeal, *supra*, the married woman herself received the money and paid the mortgage, and herself applied it to her own use. It was because the money was applied to her own use by her that the plaintiff's claim was sustained.”

After citing McCleary's Appeal, 20 W. N. C. 547, the master concludes:

“Upon the whole case, the master is of opinion that under the letter of attorney of December 26, 1888, there was no power in William B. Robins to make a mortgage of plaintiff's real estate; and further, that while defendants may or may not have rights in an action at law in regard to the moneys paid by them in discharge of good incumbrances and liens upon plaintiff's real estate, the principles of subrogation cannot be successfully invoked by them in the premises; and recommend that a decree be made in conformity with the prayers of the bill.”

Exceptions to the master's report averred that the master erred in reporting (1) that there was no power to mortgage under the letter of attorney dated December 26, 1888; (2) that the various mortgages were not validly executed; (3, 4) were not valid liens; (5) that defendant was not entitled to subrogation; (6, 7) decree.

The court dismissed the exceptions in the following opinion by THAYER, P. J.:

"The principles which are applicable to the determination of this case are those which relate to the law of agency, and the cases upon the subject of power to sell contained in deeds of trust, wills or other instruments where the donee of the power has the ownership or virtual control of the property over which the power is to be exercised, or where a power has been given by such an instrument to a trustee for the purpose of effecting a conversion of the property or of raising a fund for a *cestui que trust* have no application. The question here is not the construction of a power given to a donee, devisee or grantee, or to a trustee for appointment, or for the purpose of defining the limitation of an estate, or regulating its future control or management. It is, on the contrary, a question which relates simply to the construction of a written authority given by the owner of the property to a naked agent appointed for a specific purpose, with no interest in the subject of the power, and no authority beyond it either expressed or implied. A, being desirous of changing an investment, employs B to sell his house. Would not any one in the place of A be justly astonished if he was informed the next day that B had not sold his house but mortgaged it; that he had not found a purchaser, but had placed an incumbrance upon the property, and that the owner was not to get the price of the property which he had directed to be sold, but would thereupon be bound by a solemn obligation to pay the interest upon a loan which he had never authorized, and did not want, but which had been securely fastened upon his

property, and that he was bound for its payment by a bond which he had never given any authority to any one to sign or seal for him? This is the whole case so far as it relates to the construction of the letter of authority given by the plaintiff to William B. Robins December 26, 1888. That a naked agent, who is authorized by a letter of attorney to sell for his constituent has no authority to mortgage, is plain alike upon principles of reason and by all the authorities upon the subject. They have been diligently collected and clearly stated by the learned master in his very able and lucid printed report in this case. So that it is quite unnecessary for me to recapitulate them here. The text writers are unanimous on the same points.

“Indeed no other rule could be tolerated without introducing the greatest confusion and injustice into business affairs.

“It is entirely unnecessary, therefore, for me to go through the long lines of Pennsylvania cases, commencing with *Lancaster v. Dolan* in 1 Rawle, and ending with *McCreary v. Bomberger* in 151 Pa. State Reports. The master has analyzed and dissected each one of them with great skill and perspicuity in his report for the purpose of showing the fundamental difference between those cases and the present case; but it was, in my opinion, an unnecessary labor, for these cases have no application to the case in hand. They relate to a totally different subject, viz. : the construction of powers given to devisees, or trustees for devisees, to enable them to raise a fund for the accomplishment of a specific purpose contemplated by the donor of the power—a purpose as readily effected by a mortgage as by a sale. They are not at all applicable to the case of a mere agent employed by the owner for the sole purpose of making a sale, with no other purpose in view, and no authority whatever beyond that specific purpose. The concise phrase, which has grown into a convenient legal apothegm, ‘a power to sell is a power to mortgage,’ is applicable only to the doctrine of power as applied to the cases of the kind

which I have already mentioned, and even there has its exceptions and limitations, but it has no legitimate or proper application to the construction of a letter of attorney given to a mere agent employed for no other purpose than to sell a house for the owner, and not authorized either by words or intendment of the instrument to do anything else. It might with as much justice and propriety be applied to a letter of attorney authorizing an agent to sell stocks, and for the purpose of justifying him in pledging the stocks, contrary to his orders, instead of selling them.

"We are therefore of opinion that under the letter of attorney of December 26, 1888, from Mrs. Campbell to William B. Robins, he had no authority whatever to mortgage the Walnut street house. That Robins knew that he had no such authority is evident from the fact that when, subsequently to the execution of the letter of attorney, he conceived the idea of obtaining a loan by mortgage upon the property from the Western Saving Fund he procured from Mrs. Campbell another power of attorney (June 10, 1889), which specifically authorized him to make and deliver a bond and mortgage to the Western Saving Fund for \$6,000.

"If the defendants in the present case had been equally careful with the Western Saving Fund in demanding of the agent before making the loan the production of an explicit power of attorney from Mrs. Campbell, authorizing it, there would have been no occasion for the present suit and the defendants would have suffered no loss. They were very careless in lending Robins the money without sufficient proof of his authority from Mrs. Campbell to borrow it. As it was, the defendants acquired no title to the property and no rights against the plaintiff by the bond and mortgage executed by Robins to them December 23, 1890, any more than if they had been forgeries from which, indeed, they are not far removed, for it is clear that Robins had no right to execute them in her name.

"Upon the second point argued, viz.: The claim of defendants to be subrogated to the former rights of lien claimants whose debts had been paid and satisfied out of the fund fraudulently raised by Robins, we are unable to see, after much consideration given to the subject and a careful examination of the authorities, that the claim has any legal foundations upon which to rest. The Real Estate Title Company who insured the defendants' title and by whom the settlement was made, were, as the master reports, the agents of the defendants in paying off the preceding mortgage and taxes. They were virtually payments made by the defendants, who were mere volunteers, paying off incumbrances upon a property to which they thought they had a good title as mortgagees, but to which they had none. There was no privity whatever between them and Mrs. Campbell, who did not receive a cent of the money they loaned to Robins, and who was entirely ignorant of the whole transaction, the loan having been fraudulently concocted by Robins, who appropriated the net proceeds to his own use. The defendants occupy towards the plaintiff the attitude of a stranger interfering without her knowledge or consent with her property for what they supposed to be for their own best interests. In making these payments they were mere volunteers, for there was neither privity of estate, privity of contract nor privity of any kind between them and the plaintiff, and the law is well settled that the principles of subrogation in equity do not apply in favor of volunteers. Voluntary payment of a mortgage debt by one who sustains no legal relation to the property or the owner cannot operate to subrogate him to the rights of the former holder of a satisfied mortgage. It has been decided that even one who loans money to another to pay the mortgage has no claim to subrogation to the right of the mortgagee. A good illustration of the principles is the familiar case of a surety who pays the debt of his principal and becomes thereby entitled to the securities of the creditor; a stranger

or one standing in no legal relation to the debtor, would have no such right. I have not been able to find any authority which would justify the claim of the defendants to be subrogated to the former rights of the owners of the satisfied mortgage and liens in this case. Maurer's Appeal, 86 Pa. 380, much relied on by the defendants, was a totally different case from the present. There the married woman herself received the money, and herself applied it to the payment of the preceding mortgages. In the present case the plaintiff had nothing to do with the payment and no knowledge of it whatever. The present case is the case of a volunteer loaning money on a worthless security given by a third party in the perpetration of a fraud which he had planned for his own benefit, and then without the knowledge of the owner, paying off an incumbrance to increase its own security. It is unnecessary to go through the cases upon this subject. They have been collected and discussed by the master with the same diligence and ability which characterizes the rest of his report."

The opinion further cited: Webster & Goldsmith's Appeal, 86 Pa. 409; Mosier's Appeal, 56 Pa. 76; Maurer's Appeal, 86 Pa. 409, and McCreary's Appeal, 20 W. N. C. 547.

Errors assigned were (1-7) dismissal of exceptions, quoting them; (8) entry of decree; (9) in not dismissing bill; (10) refusal of subrogation.

John G. Johnson, for appellant.—The power given to Robins to sell included a power to mortgage: *Lancaster v. Dolan*, 1 Rawle, 231; *Zane v. Kennedy*, 73 Pa. 182; Maurer's Appeal, 86 Pa. 409; *Wurfflein v. Haines*, 14 W. N. C. 76; *Mills v. Banks*, 3 P. Wms. 9; *McCreary v. Bomberger*, 151 Pa. 323.

The doctrine which was laid down in *Lancaster v. Dolan*, and which has been so frequently reiterated, rests upon an interpretation of the meaning of words. It was held that the greater power included the less and that a power to make

a conveyance in fee simple included every conveyance in fee simple as well with, as without, a condition of defeasance.

The contrary decisions from other states were made in states where the rule of *Lancaster v. Dolan*, even in the case of a deed or will, was not conceded to be correct.

It was urged before the master that our Pennsylvania cases were those in which the power was annexed to an estate, and that the interpretation of the meaning of the power should be different where, as in a letter of attorney, there was no estate. The cases, however, do not sustain this distinction. In the last one we have cited there was no estate in the executrix. Nothing more than a power was conferred upon her.

It was also said that our cases have been decided in the past in adherence to the *Lancaster v. Dolan* rule, because the power was given for the purpose of raising money. We can see no warrant for this assertion. In *McCreary v. Bomberger* and in *Wurfflein's Appeal* the power was not conferred for the purpose of raising money, but for the purpose of making a change of investment. It can hardly be supposed that a power there given, as in this case, for the purpose of changing investments, was supposed by the testatrix to confer a power to create an indebtedness and to secure the same by an incumbrance. This court, however, disregarded all considerations of the reason which moved the testatrix to confer the power and interpreted the words by the light of its past decisions. It deemed it more important to sustain a rule of property than to make effectual a possible special intent.

Where money is paid by mistake, not officiously nor by way of mere intermeddling, in liquidation of the debt of another, by one who takes as security therefor a mortgage believed to be executed on behalf of such other, a chancellor, when asked to order cancellation of the latter, will grant relief only on condition of subrogating the person thus paying such debt to the position of the original cred-

itor: *Peters v. Florence*, 38 Pa. 198; *Aldrich v. Cooper*, 2 L. Cas. Eq. 289; *Mosier's Appeal*, 56 Pa. 80; *Cottrell's Appeal*, 23 Pa. 294; *McCormick v. Irwin*, 35 Pa. 117; *Iron City Tool Works v. Long*, 44 Leg. Int. 28; 2 Greenl. Ev., §§ 14, 111; *Snelling v. McIntyre*, 6 Abbott N. C. N. Y. 469; *Sidener v. Pavey*, 77 Ind. 241; *Sheldon on Subrogation*, 2d ed., § 361 a; *Bright v. Boyd*, 1 Story, 478; *Everston v. Bank*, 33 Kan. 352; *Hammond v. Barker*, 61 N. H. 53; *Payne v. Hathaway*, 3 Vt. 212; *Gans v. Thieme*, 93 N. Y. 225; *Dixon on Subrogation*, 165; *Bolman v. Lohman*, 74 Ala. 507; *Twombly v. Cassidy*, 82 N. Y. 155; 1 *Jones on Mortgages*, § 874 c; *Milholland v. Tiffany*, 64 Md. 455; *Keener on Quasi Contracts*, 388; *Graff's Estate*, 139 Pa. 76; 2 *Beach Equity Jur.* 869; *Bank v. Epstein*, 44 Fed. R. 404; *Wallace's Estate*, 59 Pa. 405; *Hoover v. Epler*, 52 Pa. 524; *Building Society v. Cunliffe*, L. R. 22 Ch. D. 61; *Wenlock v. River Dee Co.*, L. R. 19 Q. B. D. 155; *Maurer's Appeal*, 86 Pa. 380.

Thomas Hart, Jr. (*John G. Lamb* with him), for appellee.—The doctrines of Pennsylvania law upon the subject of the powers of agents are altogether opposed to the proposition that a power to an agent to sell and convey real estate empowers the agent to mortgage the same. There is no analogy between the cases of powers under will or deeds and under letters of attorney: *Peck v. Harriott*, 6 S. & R. 145; *Strohecker v. Bank*, 6 Watts, 96; *Heffernan v. Adams*, 7 Watts, 116; *Devinney v. Reynolds*, 1 W. & S. 328; *Baring v. Pierce*, 5 W. & S. 548; *Sugden, Powers*, p. 255.

The power of attorney of December 26, 1888, conferred on Robins no power to borrow money for plaintiff and give any obligation binding her therefor. The bond for \$7,500, given by the attorney to appellant, was not good as against appellee. The mortgage given to secure the same was, therefore, also void: *Presbyterian Corporation v. Wallace*, 3 Rawle, 109; *Thomas's Appeal*, 30 Pa. 373; *Wilson v.*

Schoenberger's Exrs., 31 Pa. 295; *Rice v. Southern Pa. I. & R. Co.*, 9 Phila. 294; *Lance's Appeal*, 112 Pa. 456; *Biddle v. Hall*, 99 Pa. 116; *Brigham v. Potter*, 14 Gray, 522; *Wearse v. Pierce*, 24 Pick. 141; *Hannan v. Hannan*, 123 Mass. 441; *Heburn v. Warner*, 112 Mass. 271; *Miller v. Ege*, 8 Pa. 356; *Bayard v. Bank*, 52 Pa. 232; *Martin's Appeal*, 13 W. N. C. 167; *Bell v. Bank*, 131 Pa. 318; *Mechem on Agency*, § 389.

There is no case anywhere which decides that an attorney-in-fact, with power to sell and convey real estate, may mortgage the same. On the contrary, every case in which that question has arisen is the other way: *Wood v. Goodridge*, 6 Cush. 117; *Morris v. Watson*, 15 Minn. 212; *Jeffrey v. Hursh*, 49 Mich. 31; *Jeffrey v. Hursh*, 58 Mich. 246; *Hubbard v. Congregation*, 34 Iowa, 31; *Switzer v. Wilvers*, 24 Kan. 384; *Nixon v. Hyserott*, 5 Johns. 58; *Borel v. Rollins*, 30 Cal. 408; *Phelps v. Harris*, 101 U. S. 370; *De Bouchot v. Goldsmid*, 5 Ves. 211; *Coondoo v. Watson*, L. R. 19 Ap. Cas. 561; *Mechem on Agency*, §§ 318, 321, 323; *Story on Agency*, § 68; 1 *Fisher's Law of Mortgages*, 260; 1 *Jones on Mortgages*, § 129; *Whart. on Agency*, §§ 193, 746; *Fitch's Law of Real Estate Agency*, 140.

But in this case the power to sell is so limited in terms that there is no room for the implication of a power to mortgage, supposing it can ever be implied in case of an agency to sell: *R. R. v. Nav. Co.*, 36 Pa. 204; *Horwitz v. Norris*, 49 Pa. 213; *Wickersham v. Savage*, 58 Pa. 365; *Bradley v. R. R.*, 36 Pa. 151; *Pepper's Appeal*, 120 Pa. 235; *Perry on Trusts*, § 783; *Morrill v. Cone*, 22 How. 75; *Jenkins v. Funk*, 33 Fed. R. 915; *Deputron v. Young*, 134 U. S. 241.

The line of Pennsylvania cases, commencing with *Lancaster v. Dolan*, does not contradict the foregoing propositions, and furnishes no ground for the contention that a power to an agent to sell and convey real estate empowers the agent to mortgage the same. See in addition to the

cases cited by the master: *R. R. v. Baab*, 9 Watts, 458; *Stichter v. R. R.*, 11 W. N. C. 325; *Millvale Boro. v. Evergreen Ty.*, 131 Pa. 1; *Trans. Co. v. Pullman Co.*, 139 U. S. 50; *Ball v. Harris*, 4 Myl. & Cr. 264.

The rule of the Pennsylvania cases should not be extended. It should not be applied to cases of a different character, for the additional reason that the original authority cited in *Lancaster v. Dolan* was misapplied, and because it has since been disapproved of in England and other states, and its doctrine is now limited and applied to a certain class of cases only: *Ball v. Harris*, 4 Myl. & Cr. 264; *Haldenby v. Spofforth*, 1 Beavan, 390; *Stroughill v. Anstey*, 1 De G., M. & G. 635; *Page v. Cooper*, 16 Beav. 396; *Devayne v. Robinson*, 24 Beav. 86; *Dimmock's Case*, 52 L. T. N. S. 494; 31 Am. Law Reg. & Rev., p. 17; *Ferry v. Laible*, 31 N. J. Eq. 566; *Loebenthaler v. Raleigh*, 36 N. J. Eq. 169; *Hoyt v. Jacques*, 129 Mass. 286; *Kent v. Morrison*, 153 Mass. 137; 2 Perry on Trusts, 768; 4 Kent's Com. 147; 2 Washb. R. Prop. 708; 1 Powell on Mtgs. 61; 1 Jones on Mtgs., § 128; 2 Spence Eq. Juris. 369; 1 Lewin on Trusts, 426.

The power was exhausted: *Slifer v. Beates*, 9 S. & R. 166; *Ellitt's Case*, 5 Whart. 524; *Asay v. Hoover*, 5 Pa. 21; *Maurer's Appeal*, 86 Pa. 380; *Denny v. Lyon*, 38 Pa. 98; *Swift's Appeal*, 87 Pa. 502.

Defendant had no right to subrogation: *Beach on Eq. Juris.*, § 798; *Sheldon on Subrogation*, §§ 1, 240, 241; *Evans v. Duncan*, 4 Watts, 24.

One cannot, by voluntarily paying money or rendering service for another, not having been requested so to do, make that other his debtor, or subrogate himself to the right of the creditor: *Homestead Co. v. R. R.*, 134 Mass. 82; *Moody v. Moody*, 68 Me. 155; *Hoover v. Epler*, 52 Pa. 522; *R. R. v. Dickey*, 131 Pa. 93; *Parker's Appeal*, 8 W. & S. 449; *Wallace's Estate*, 59 Pa. 401; *Maurer's Appeal*, 86 Pa. 380; *Forest Oil Co.'s Appeal*, 118 Pa. 145; *McCleary's Appeal*,

20 W. N. C. 547; *Downer v. Wilson*, 33 Vt. 1; *Wilson v. Soper*, 44 Me. 118; *In re North River Construction Co.*, 38 N. J. Eq. 433; *Wood v. Gilson*, 17 Ill. 218; *Wolff v. Walter*, 56 Mo. 292; *Cockrum v. West*, 122 Ind. 372; *Gerdine v. Menage*, 41 Minn. 417; *Oury v. Sanders*, 77 Texas, 278; *Dutcher v. Hobby*, 86 Ga. 198; *Lockwood v. Marsh*, 3 Nev. 138; *Clark v. Clark*, 58 Miss. 68; *Bank v. Clute*, 33 Hun, 82; *Bolman v. Lohman*, 74 Ala. 507; *Everston v. Bank*, 33 Kan. 252; *Gilbert v. Gilbert*, 39 Iowa, 657; *Chafee v. Oliver*, 39 Ark. 531; *Levy v. Martin*, 48 Wis. 198; *Flannary v. Utley*, 5 S. W. R. 878; *Fry v. Hammer*, 50 Ala. 52; *Ins. Co. v. Buck*, 108 Ind. 174.

GREEN, J.—After a laborious study of this case, and a most serious consideration of the elaborate and exhaustive arguments of the learned counsel on both sides, we are constrained to say that we think the case was correctly decided in the court below. On the question whether the letter of attorney from the plaintiff to her attorney-in-fact, Robins, dated December 26, 1888, is to be construed as conferring a power to mortgage the premises in question, we are quite clear as to the correctness of the decision made both by the master and the court below. It is true the precise question does not seem to have been before us heretofore, but we are convinced that the considerations which prevailed in *Lancaster v. Dolan*, 1 Rawle, 231, and its train of cases, resulting in the declaration that a power to sell land includes a power to mortgage, are entirely inapplicable in the interpretation of a mere letter of attorney, with a naked authority to sell, uncoupled with any interest in the land or the fund. The instrument now in question was essentially of this latter class. So far as this matter is concerned, it is in the following words: "Do make, constitute and appoint William B. Robins, of said city, attorney-at-law, my true and lawful attorney, for me and in my name to grant, bargain and sell, in fee simple, all real estate owned by me, includ-

ing all ground-rents, on such terms and for such prices as he may see fit, and to make, execute and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties or with said ground-rents." It cannot be questioned that this is but an ordinary letter of attorney to sell real estate in fee simple. It is nothing but a naked authority to sell, and make deeds to the purchasers, without any interest whatever in the proceeds, without any power to invest the same or to exercise any kind of control over them. There was no power to raise money for any trust, or to pay debts or charges, or to provide a fund for any charitable or other purpose, or for the support of any third person. In short, there was no power of any kind whatever to do more than simply to sell the property and to make deeds to the purchasers. Under this narrow, specially defined and closely limited authority, the agent executed a bond in the name of his principal for the payment of \$7,500, and to secure the payment of the bond he executed a mortgage of her real estate, also in her name, and thereby made her a debtor in a large sum, when his only authority to act for her was to sell her real estate and bring her the proceeds. Instead of being the seller of real estate, in the enjoyment of the fruits of the sale, she was converted into a debtor, with all the duties and obligations which that relation implies. We do not know of any doctrine in the law of principal and agent which will permit such a result to be accomplished in such a mode. The books abound with endless decisions which are in utter hostility with such a transaction as a valid act. Being a debtor, the plaintiff would be subject to an obligation to pay not only the principal sum of \$7,500, but also annual sums of interest. For failure in her payments she would become personally liable for the moneys due, and be subject to a general judgment which would be a lien upon all her real estate, and upon which process of execution might issue and be levied upon her personal property. In point

of fact, a warrant of attorney for the entering of judgment against her for the debt was contained in the bond executed in her name by her attorney under an authority which gave him only a bare right to sell her lands. It is not credible that the citizen can be held subject to such consequences, so entirely inconsistent, unexpected and hostile to his express intent, in an instrument of such a character. Whatever else may be said of such a paper, it must be conceded that, in its terms and in its legal substance, it is a plain, simple letter of attorney, establishing the relation of principal and agent between the parties to it. It must therefore be regarded as subject to the rules and requirements of that branch of the law, in any event, and if these will not permit it to be used for an ulterior purpose, such as is claimed in the present case, then it cannot be so used.

Regarded simply as a letter of attorney, establishing an agency, the law concerning it is very clear. Thus, in *Devinney v. Reynolds*, 1 Watts & S. 328, Mr. Justice ROGERS, delivering the opinion, said: "An agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds his power. A special power must be strictly pursued, and whoever deals with an agent constituted for a special purpose deals at his peril when the agent passes the precise limits of his power." This was said of a deed made by an attorney-in-fact who was authorized to convey a tract of land after he had redeemed it, and he conveyed it without redemption, and it was held the purchaser took no title. In *Story on Agency* (ed. 1882, § 68) the author says: "Indeed, formal instruments of this sort [letters of attorney] are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect. Thus, a power of attorney to sell, assign and transfer stock will not include a power to pledge it for the agent's own debt." 1 Jones, *Mortg.*, § 129. A mortgage executed under

a power of attorney authorizing an attorney to sell and convey only is void. Said Mr. Justice COOLEY, in *Jeffrey v. Hursh*, 49 Mich. 31: "J. M. Hursh had power to sell the land, but not to mortgage it. The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgage: *Wood v. Goodridge*, 6 Cush. 117; *Insurance Co. v. Bay*, 4 N. Y. 9; *Ferry v. Laible*, 31 N. J. Eq. 566; *Kinney v. Matthews*, 69 Mo. 520; *Patapsco Guano Co. v. Morrison*, 2 Woods, 395; *Devaynes v. Robinson*, 24 Beav. 92." *Deputron v. Young*, 134 U. S. 241: In the case of a naked power, not coupled with an interest, every prerequisite to the exercise of that power should precede it. A power to make and execute deeds to convey real estate, as the same may be sold to purchasers in tracts by a third party, is a naked power to convey as sales may be made, and a deed made otherwise is a fraud upon the power. *Morris v. Watson*, 15 Minn. 212 (Gil. 165): As a general rule, a power to sell and convey real estate does not convey a power to mortgage, and a mortgage executed under a power of attorney to sell and convey is void. The court said: "The power of attorney in this case by Mary C. Hargin to Charles S. Hargin is a power to sell and convey only. Therefore the mortgage executed by Charles S. Hargin to Moses Sherbrome under this power of attorney is void." In the case of *Wood v. Goodridge*, 6 Cush. 117, a power of attorney authorized the attorney, in the name and for the benefit of the principal, to buy and sell real and personal property, and to execute and deliver deeds, to transfer the same, to move and institute all necessary suits for the recovery and collection of his demands, . . . especially to carry on his saw-mill, and buy and sell logs and lumber, . . . and in general to make such contracts for the profitable improvement and

use of such property and other means as he possessed for the enlargement of his estate. The attorney made a mortgage and note for a sum of money, and the question of his power to make them arose and was decided. The court said: "Levi Goodridge, who made the mortgage and note, had no authority, under his power of attorney from Benjamin Goodridge, to do these acts, so that the mortgage and note are both invalid and without any legal effect. In accordance with the general and well-settled principles of law, the power of attorney to Levi must be so interpreted as not to extend the authority given to him beyond that which is given in terms, or which is necessary and proper for carrying the authority expressly given into full effect. Now, the power of attorney in this case very clearly did not in terms give to Levi authority to mortgage the real estate of his principal. Still less does it in terms give him the power to borrow money, and to bind his principal by a promissory note. . . . In the absence of all evidence that the money was in fact obtained for the principal, or that it was necessary for the execution of the authority given, there being no express authority to make a mortgage or negotiable note, there is an entire failure to show that Levi had any authority to make the note and mortgage; and the title of the plaintiff, being derived under that mortgage, wholly fails."

It is not necessary to quote further authorities for a proposition so plain in its character, and not opposed by any contrary decisions. As we have already said, the cases of *Lancaster v. Dolan*, and those that follow it, are not pertinent to the discussion, because they depend upon different principles and upon facts which have no existence here. We are therefore brought to the consideration of the remaining question, whether the appellant is entitled to subrogation to the \$6,000 prior mortgage, which was paid off with the proceeds of the mortgage in suit. Upon that subject it is to be observed that the payment of the prior

mortgage was the act of a mere volunteer. The plaintiff was not consulted about it, and had no knowledge of it. There was no privity of any kind between the plaintiff and the defendant, and the latter was under no compulsion to make the payment for the protection of its interests. The payment was doubtless made so as to make its mortgage a first instead of a second mortgage. But that consideration would give no right of subrogation to the holder of the second mortgage. It seems to us that the case of *McCleary's Appeal*, 20 W. N. C. 547, covers every aspect of this. There the first mortgage was an undoubtedly valid lien upon the property for \$925. The second mortgage was a forgery, and the holder, as here, desiring to have the first lien extinguished, paid \$600 of the mortgage money (\$1,400) to the agent of the owner of the property, who, with \$325 furnished by the owner, paid the \$925 due on the first mortgage, had it satisfied, and surrendered the bond and the mortgage to the owner. When the forgery was discovered the holder of the second mortgage filed a bill praying a cancellation of the entry of satisfaction and subrogation. Both the court below and this court held that this could not be done, and dismissed the bill upon the express ground that although the first mortgage was an unquestioned lien, and the money, to the extent of \$600, was paid by the holder of the second mortgage, he was a mere volunteer in making such payment, and was not entitled to subrogation. The same doctrine was enforced in the case of *Webster & Goldsmith's Appeal*, 86 Pa. St. 409, the syllabus of which is as follows, viz.: "While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor." There the maker of a promissory note for \$700 gave a judg-

ment for that amount to his indorser, to protect him against liability on his indorsement. Afterwards, at the maturity of the note, another person consented to indorse a new note, to take up the first one, upon the express assurance of the maker that the judgment should be assigned to the second indorser for his protection against liability for the same debt. The judgment was assigned shortly after to the second indorser, who was ultimately obliged to pay the note. The property of the maker being sold upon execution process, the holder of the assigned judgment claimed a share in the distribution of the proceeds as against judgments obtained subsequently to the assigned judgment. Priority in the distribution was allowed to the assigned judgment in the court below, but this court reversed the decree, holding that the second indorser was a mere volunteer, and that, as the first judgment had served its purpose of protecting the first indorser, it could not be used to protect the second indorser, although assigned to him for that purpose by the first indorser as a condition of the second indorsement. While we decided that if the judgment had been held by the bank which discounted the note, as a part of their security, subrogation would have been granted, even against intervening judgment creditors, we held also that it could not be granted to one who came in as the indorser of a new note given to take up the first note, because he was a stranger to the first contract, and was to be regarded as a mere volunteer. WOODWARD, J., said: "While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another: *Hoover v. Epler*, 52 Pa. St. 522. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor: *Mosier's Appeal*, 56 Pa. St. 76. . . . There was no privity of interest, and no contract relation, between Bauer and Banker. Bauer

could create no duty to himself by a volunteered intervention for Banker's relief. He became Adam's indorser without being under any legal or moral compulsion, and he had no existing interest, ascertained or contingent, to protect. He has no equity to entitle him to subrogation." So here the payment of the \$6,000 due under the first mortgage was not made under any compulsion or for the protection of any rights or interests previously acquired. The defendant simply loaned the money, and, in order to remove a prior lien, paid it off without the knowledge or consent of the plaintiff. If a right of subrogation is acquired in such a state of facts, we see no reason why it may not exist in every case of officious payment of the debt of another. Yet it is perfectly clear, under all the authorities, that such payments do not give any right of subrogation to the debt discharged. In *Beach on Modern Equity Jurisprudence* (§ 801) the writer says: "But one who is only a volunteer cannot invoke the aid of subrogation, for such a person can establish no equity. He must have paid upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right. In such a case, instead of creating any right of subrogation, the payment operates as the absolute discharge of the debt so paid. Thus one who discharges an incumbrance upon property which he has no interest in having relieved is not thereby subrogated to the rights of the holder of the incumbrance, and the loaning of money to discharge a lien does not subrogate the lender to the rights of the lien holder." Sheldon, in his work on *Subrogation* (§ 240), says: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own." There can be no question of the soundness of the foregoing propositions, and where the facts are such as to make them

applicable they are controlling. We think, for reasons already stated, they are directly applicable to the undoubted facts of the present case. It is not practicable, within the proper limits of a judicial opinion, to engage in a critical review of the numerous decisions cited in the arguments of counsel on both sides. A great many of them furnish their own answer, when the facts which distinguished them are duly noted and considered. Others, which are apparently, in point, are affected by the presence of exceptional circumstances which authorize the introduction of different principles with a controlling effect. But a minute and patient attention to and consideration of the very able and exhaustive argument for the appellant has failed to convince us of any error in the treatment of the case by the learned master and the court below, and, substantially, for the reasons stated by them, we think the decree should be affirmed. Decree affirmed and appeal dismissed at the cost of the appellant.

Subrogation will not be decreed in favor of a volunteer or one who, no obligation resting upon him to do so, has paid the debt of another: *Harrison v. Bisland*, 5 Rob. (La.) 204; *Fort v. Union Bank*, 11 La. Ann. 708; *Roth v. Harkson*, 18 Ib. 705; *Stiwell v. Burdell*, Ib. 17; *Brice v. Watkins*, 30 Ib. 21; *Weil v. Enterprise Ginnery and Mfg. Co.*, 42 Ib. 492; *Wadsworth v. Blake*, 43 Minn. 509; *Gadsen v. Brown*, 1 Speers, Eq. 41; *Shinn v. Budd*, 14 N. J. Eq. 234; *Griffin v. Proctor*, 14 Bush. 571; *Sheldon on Subrogation*, § 1; *Beach, Mod. Eq. Juris.*, § 801. A volunteer in this connection is one who, from the existing state of affairs, can in no event become liable for the debt he pays and whose property is not charged therewith and cannot be sold therefor: *Arnold v. Green*, 116 N. Y. 566. If a person under such circumstances pay, the debt is extinguished, but he is not subrogated to the right of the holder of the incumbrance: *Webster's Appeal*, 86 Pa. 409; *Brice v. Watkins*, *supra*; *Kitchell v. Mudgett*, 37 Mich. 82; *Moody v. Moody*, 68 Me. 155; *Wolff v. Walter*, 56 Mo. 292. The same is

the case when, without a contract to the effect that he shall have the benefit of the creditor's security, a person loans the money wherewith the lien is extinguished: *Unger v. Lester*, 32 Ohio St. 210; *Downer v. Wilson*, 33 Vt. 1; *Wilson v. Soper*, 44 Me. 118; *Farmers' Bank v. Erie R. R. Co.* 72 N. Y. 188; *Mosier's Appeal*, 56 Pa. 76; *Smith v. Foran*, 43 Conn. 244; *Jacques v. Fackney*, 64 Ill. 87; *McGay v. Kribbath*, 14 Abb. Pr. 142. A person *having an interest in mortgaged premises*, who, for his own protection or for the benefit of the principal debtor, discharges the incumbrance, becomes thereby entitled to be subrogated to the rights of the mortgagee, although no obligation rested upon said person to pay the mortgage: *Powers v. Golden Lumber Co.*, 43 Mich. 468; *Smith v. Provin*, 4 Allen, 516; *Green v. Tanner*, 8 Metc. (Mass.) 411; *Morse v. Smith*, 83 Ill. 396; *Willis v. Jel-ineck*, 27 Minn. 18; *Wiley v. Ewing*, 47 Ala. 418; *Scott v. Henry*, 13 Ark. 112; *Southworth v. Scofield*, 51 N. Y. 513; *Graham v. Dunnigan*, 4 Abb. Pr. 426; *Lucking v. Wesson*, 25 Mich. 443; *Evans v. Saunders*, 3 Lea, 734; *Exall v. Partridge*, 8 T. R. 308; *In re Coster*, 2 Johns. Ch. 503; *Dings v. Parshall*, 7 Hun, 522; *Denman v. Nelson*, 31 N. J. Eq. 452; *Page v. Foster*, 7 N. H. 392; *Downer v. Fox*, 20 Vt. 388; *Young v. Williams*, 17 Conn. 393; *Darst v. Bates*, 95 Ill. 493; *Goode v. Cummings*, 35 Iowa, 67; *Darling v. Harmon*, 47 Minn. 166; *White v. Hampton*, 13 Iowa, 259; *Carter v. Taylor*, 3 Head, 30; *Staples v. Fox*, 45 Miss. 667; *Griswold v. Marshman*, 2 Ch. Cas. 170; *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Tarbell v. Durant*, 61 Vt. 516; *Wood v. Hubbard*, 50 Ib. 82; *Weld v. Sabin*, 20 N. H. 533; *State v. Brown*, 73 Md. 484; *Baker v. Pierson*, 6 Mich. 522; *Flachs v. Kelly*, 30 Ill. 462; *Marshall v. Ruddick*, 28 Iowa, 487; *Abbott v. Union Life Ins. Co.*, 127 Ind. 70; *Arnold v. Foot*, 7 B. Mon. 66; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Brainerd v. Cooper*, 10 N. Y. 356; *Brown v. Simons*, 44 N. H. 475; *Armstrong v. McAlpin*, 18 Ohio St. 284; *Russell v. Howard*, 2 McLean C. C. 489; *Southard v. Dorrington*, 10 Neb. 119; *Grigg v. Banks*, 59 Ala. 311; *Ventress v. Creditors*, 20 La. Ann. 359; *Ward v. Seymour*, 51 Vt. 320; *Johnson v. Barrett*, 117 Ind. 551; *Yaple v. Stephens*, 36 Kan. 680; *Holt v. Penacook Saving Bank*, 62 N. H. 551; *Bush v. Wadsworth*, 60 Mich. 255; *Wallace v. McBride*, 70 Ib. 596; *Emigrant Industrious Sav. Bank v. Clute*,

114 N. Y. 634; *Everson v. McMullen*, 113 Ib. 293; *Fears v. Albia*, 69 Tex. 437; *Swain v. Stockton Sav. and Loan Soc.*, 78 Cal. 600; *Gerdine v. Menage*, 41 Minn. 417; *Magill v. Dewitt Co. Nat. Bank*, 126 Ill. 244; *People's Nat. Bank v. Epstein*, 44 Fed. Rep. 403; *Ohmer v. Boyer*, 89 Ala. 273; *Gaus v. Thieme*, 93 N. Y. 225; *Bowen v. Barksdale* (S. Car.), 11 S. E. Rep. 640; *Lamb v. Montague*, 112 Mass. 352; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Laylin v. Knox*, 41 Mich. 40; *Denton v. Cole*, 30 N. J. 244; *Muir v. Berkshire*, 52 Ind. 149; *Barnes v. Mott*, 64 N. Y. 397; *Levy v. Martin*, 48 Wisc. 198; *Sheldon on Subrog.*, § 12; *Beach, Mod. Eq. Juris.*, § 804. But where one who, before making the payment, sustains no relations to the parties to the debt, or to the property bound thereby, voluntarily pays a mortgage debt, or loans money to pay it, he is not entitled to subrogation: *Van Winkle v. Williams*, 38 N. J. Eq. 105; *Beach, Mod. Eq. Juris.*, § 807.

Laches—Trust.

ALSOP *v.* RIKER.

RIKER *v.* ALSOP.

(Supreme Court of the United States, December 10, 1894.)

[Reported 155 U. S. 448.]

A court of equity in the exercise of its inherent power to do justice between parties will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations.

The length of time during which a party neglects the assertion of his rights which must pass in order to show laches in equity, varies with the peculiar circumstances of each case and is not subject to an arbitrary rule. *Halstead v. Gorman*, 152 U. S. 412, affirmed and applied to this point.

The facts in this case detailed in the opinion disclose such laches on the part of Riker in asserting the rights which he here claims that a court of equity should refuse to interpose, without inquiry whether the

suit can or cannot be excluded from the operation of the statute of limitations of the state of New York.

Appeals from the Circuit Court of the United States for the Southern District of New York.

The case is stated in the opinion.

Andrew J. Riker, in person, for himself.

George W. Wingate, for Alsop and for Campbell's heir.

John M. Bowers, for Whitewright, submitted on his brief.

Mr. Justice HARLAN delivered the opinion of the court.

William H. Aspinwall, Joseph W. Alsop, Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock and William A. Booth, holders of construction bonds of the Ohio & Mississippi Railway Co., Eastern Division, issued to the stockholders and creditors of that corporation, on the 15th day of December, 1858, a circular inviting them to unite in adopting an agreement such as was transmitted with the circular. In that circular they expressed the opinion that by the adoption of the proposed agreement the company would be enabled to place its road and property in a condition to command the entire business to which, from its location, it would be fairly entitled; "to meet promptly all future demands upon it for interest on its remaining indebtedness; from its net earnings to pay fair dividends upon its stock within a reasonable time; and that all causes for litigation will be removed, and the interests of all parties be thereby placed in a safe and reliable position."

With the circular was submitted a statement showing that the estimated liabilities of the company, with interest to July 1, 1859, aggregated \$18,393,768, of which \$2,050,000 were first mortgage bonds, \$258,000 were second mortgage bonds, \$4,242,000 were construction or third mortgage bonds, part of which were to be used in redeeming and retiring the second mortgage bonds and \$3,320,000 were income bonds, including scrip certificates.

The appellant, Andrew J. Riker, was at that time the holder and owner of nine of the company's construction bonds.

The agreement recited that the subscribers were "desirous that concessions shall be made by all parties in interest which shall discharge a portion of the indebtedness of said company, and thereby assure the prompt payment of all sums which shall become due on the residue thereof, and without prejudice to the proper improvement and maintenance of the road and its appurtenances."

By the first paragraph of the proposed agreement it was provided that subscribers who were owners or legal representatives of legal demands against the company would discharge the same on payment therefor by the company, as follows: For the three coupons that were then or that should become due on its first mortgage bonds next prior to and including those due July 1, 1859, one-half thereof in money, and one-half thereof in shares of the capital stock of the company at par; for the coupons that were then or that should become due on second mortgage bonds, up to and including those due April 1, 1859, one-half thereof in money, and one-half in shares at par; for the principal of second mortgage bonds, one-third in shares at par, and the remaining two-thirds in construction bonds at par; for the coupons that were then due, or that might become due, on its income bonds, up to and including those due May 1, 1859, together with the principal of such income bonds, in shares at par; for the scrip (certificates convertible into income bonds) issued by the company, in shares at par; for other evidences of indebtedness against the company, as the same were admitted or allowed by its directors, in shares at par—the interest on the above demands (excepting coupons), so to be paid, to be made up to the 1st day of July, 1859, and to be paid in the same manner as the demands to which it related.

By the second paragraph it was provided that subscribers

being owners or legal representatives of shares of the capital stock of the company would transfer all their shares to its directors, or to such person or persons as the directors should designate and appoint, to be reissued or retransferred to make the above payments, and to return to the subscribers or their legal representatives who transferred their shares such portion as they would be entitled to under the agreement, the residue, if any, to belong to the company.

The third paragraph provided that the covenants contained in the above paragraphs were upon the following conditions: (1) That the owners or legal representatives of all demands or stock paid or transferred should subscribe to and comply with the agreement, or that equivalent concessions be made, so that the entire payments contemplated should be made—the company to purchase with any balance of shares remaining after the payments above named, or with other means, \$50,000 of the first mortgage or construction bonds, and to cancel all the bonds and coupons so paid or purchased, except those necessary for exchange for second mortgage bonds as aforesaid—so that on the 1st day of July, 1859, the indebtedness should not exceed \$5,000,000, of which not more than \$2,050,000 should be represented by first mortgage bonds, and the residue by construction bonds, with interest running from March 1, 1859. (2) That the owners of the income bonds should have loaned to the company the money required to make the cash part of the above payments; such loan, with interest, to be repaid at the earliest practicable time consistent with the proper maintenance of the road. (3) That the city of Cincinnati should grant such modifications and releases of its demands, contracts and claims against the company as its directors and the trustees named in the agreement should deem satisfactory. (4) That the capital stock of the company should not exceed \$7,500,000, unless increased by a further reduction of its bonded debt.

It was further provided that the subscribers should

transfer and deliver to the persons named as trustees, their survivors and successors in trust, their several demands, and all evidences thereof, that were contemplated to be discharged or paid for in shares of stock, and all their shares of said capital stock, with power to transfer, to be managed by such trustees for the benefit of the subscribers and their legal representatives in the proportions and upon the terms and conditions specified in the agreement, and should comply with any requirements which the trustees, pursuant to authority, should make.

The persons who sent out the above circular, their survivors and successors, were named as trustees under the agreement, a majority of them to have authority to do such acts and things on behalf of the subscribers as they deemed necessary or expedient to carry out the purposes of the agreement, which did not impose liability upon a subscriber to pay any money except at his option.

The other paragraphs of the agreement prescribed in detail the mode in which the proposed scheme should be executed, and the authority which the designated trustees might exercise.

Among other things, it was provided in the proposed agreement that the trustees should issue and deliver certificates equal to the amount of demands admitted or allowed, properly equalizing any differences occasioned by priorities of time in such transfers or deliveries ; that the trustees, in their discretion, might purchase, for the benefit of the trust, bonds of the company not contemplated to be delivered to them ; also other evidences of indebtedness and shares of stock deemed essential or beneficial to the trust and to parties interested therein, and issue certificates in payment therefor ; that said certificates should be the only evidence of the interest of subscribers in the property of the trust, which interest was to be such proportion thereof as the amount of any certificate or certificates bore to the amount of all the certificates issued by the trustees ; and that when

the parties necessary to carry out the provisions of the first three paragraphs of the agreement had subscribed and complied with the same, and the trustees were furnished with evidences of the demands to be paid only in part, the trustees should cancel and surrender to the company all evidences of its indebtedness then belonging to the trust.

In view of the contingency of a foreclosure of some of the mortgages upon the road and property, it was provided that the trustees might make such arrangements with the trustees named therein, or with the owners of the bonds secured thereby, as, in their opinion, would enable them to protect the interests of the trust without making calls upon subscribers; but failing in this, and if they deemed the trust property insufficient or unavailable for the purchase of the road and property at any sale thereof, then they might, on sixty days' notice, make calls on owners of certificates for their just proportion of the means necessary for the purpose, provided that any party so called on could, at his option, omit or refuse to pay any portion of any or of all such calls in the proportion of money or bonds called, in which case the trustees could procure the deficiency from other persons, and issue and deliver certificates for such amounts as they might agree upon.

It was further provided that in the event of the purchase of the road and property by the trustees, and the procurement of title and possession, the trustees should transfer the same to the owners or legal representatives of the certificates issued in pursuance of the proposed agreement, according to and on the surrender of their several certificates, and distribute to them severally any other trust property, or the proceeds therefrom, remaining in their hands, such transfer and distribution to be made to each certificate holder in the proportion that the amounts of his certificates should bear to the whole amount of the certificates outstanding; and that if any subscriber to the agreement should, directly or indirectly, purchase the whole or any part of the road or

property, then every other subscriber, or his legal representative, could at any time thereafter, until sixty days shall have elapsed from service of notice upon him, pay or legally tender to such purchasing subscriber or subscribers such proportion of the purchase-money paid by him or them as was equal to the amounts of the certificates issued to him or them, and to such other subscribers, respectively, under the agreement, and he should then be entitled to participate in the ratio the money he paid or tendered should bear to the purchase-money.

The appellant Riker signed the agreement for three of the nine construction bonds held by him, and kept the remaining six in his possession.

On the 18th of March, 1859, formal notice was given to the stockholders of the company, by the trustees named, that only a part of those whose signatures were essential in order to carry out the main purpose of the agreement had signed it, and that the trustees, under the authority given them, had adopted a resolution that the right to subscribe would cease from and after May 1, 1859, except upon the unanimous consent of the trustees, and that on that day the trustees would determine whether the agreement had been subscribed by a sufficient number for the consummation of the objects contemplated by it.

On the 13th day of December, 1860, and at the request of the holders of certificates, the trustees made a statement that was embodied in a circular addressed to creditors and stockholders, showing that the claims surrendered to the trustees under the agreement aggregated at that time \$10,549,570.84, for which \$182,995.66 was paid in cash and \$10,366,575.18 in trust certificates.

In the same statement the trustees said: "The suit instituted by the second mortgage bondholders is being urged to a decision in the courts of Ohio and Indiana, and a decree of sale will no doubt be obtained in a few weeks at the latest, when it will become necessary for the trustees to

exercise the authority given in the agreement of 15th December, 1858, to protect the property of the trust."

By a circular issued by the trustees to creditors and stockholders on the 11th day of July, 1861, the latter were informed that the foreclosure suit instituted by the second mortgage bondholders had resulted in a decree of sale, and that by the terms of such decree the road could not be sold for less than \$1,000,000, subject to the first mortgage of \$2,050,000. Creditors and stockholders were also informed by the same circular that the trustees required from them \$623,165, in addition to their then available means, to enable them to protect the trust by a purchase of the property. The sale under the decree obtained by the holders of second mortgage bonds was advertised for October 21, 1861; but, as no bid was offered equal to the requirements of the decree, the property was not then sold.

Subsequently, certain amendments of the trust agreement were made at meetings of the subscribers, which amendments, the trustees claim, were made for the purpose of enabling them to protect the trust by purchasing second mortgage bonds, and holding them for the benefit of the trust. These purchases were made prior to April 17, 1863.

During the year 1866 the trustees and the holders of certificates issued under the trust agreement determined to wind up the trust. To that end the trustees holding second mortgage bonds for the benefit of the trust caused the property specified in the decree of foreclosure to be duly re-advertised for sale. The sale was adjourned from time to time, but it finally took place on the 9th of January, 1867, the trustees becoming the purchasers at \$1,000,000. A plan of reorganization was adopted by the certificate holders, and the trust agreement was so amended that it could be carried into effect. That plan contemplated the formation of a new corporation to receive from the trustees the property purchased by them, and all other property and rights be-

longing to the trust. The new corporation was formed by the name of the Ohio & Mississippi Railway Company, and on the 18th day of December, 1867, it took, by regular transfer from the trustees, the trust property held by the latter, including all the property, real and personal, and all the franchises of the old corporation.

The object of the present suit is to hold those who were trustees under the agreement of 1858, and who participated in the proceedings under which the Ohio & Mississippi Railway Company acquired the property in question, personally liable to Riker for the amount due on the six construction bonds he withheld from the trustees. The theory of the suit is that the agreement of 1858 had in view the protection of all the bonds held by subscribers—those withheld from, as well as those delivered to, the trustees under that agreement—and consequently that the purchase of the property by the trustees for the protection simply of the particular debts covered by the trust agreement was contrary to its objects and provisions, and was such a breach of duty upon their part as made them liable to him for the amount due on six construction bonds.

The defense, stated generally, was that the trustees held relations of trust to those who subscribed the agreement of 1868 only in respect to the debts for which the subscribers signed; that the plaintiff refused to avail himself of the opportunity to become a party to that agreement in respect to the bonds held by him, except the three construction bonds for which he signed; that by the sale under the above decree of foreclosure all the debts of the Ohio & Mississippi Railroad Company that were subordinate in right to the holders of second mortgage bonds were cut off; and that those who acted from time to time as trustees under the agreement of 1858, had no duty to perform except to represent the subscribers thereto in respect to the parts of claims for which they signed. The defendants also relied upon the statute of limitations barring all claims not accruing

within six and ten years, respectively, before the commencement of action.

The court below sustained the plaintiff's demand, and rendered a personal decree for the amount due on his six construction bonds not embraced in the agreement of 1858. The decree was for the aggregate sum of \$18,305. Both plaintiff and defendants appealed, the former claiming that a larger amount should have been awarded to him.

The grounds upon which the Circuit Court held the plaintiff to be entitled to a decree for the value of his six unsurrendered construction bonds are fully stated in an opinion rendered by the learned circuit judge who tried the case: 27 Fed. 251, 256, 257. "The concessions to be made by holders of construction bonds," the court said, "were the surrender by them of one-third of the principal of their bonds, and acceptance, in lieu thereof, of an interest in the trust fund which was to come into the hands of the trustees under the plan of the agreement. Beyond the one-third which they were to surrender, they were to have no interest in the trust fund, and their rights were to remain the same as though no agreement had been subscribed; and the only change effected in their previous relations to the company was that thenceforth they were embarked with the trustees in the common undertaking which the trustees obligated themselves to carry out. By the terms of the agreement the trustees promised to distribute the trust fund which was to be created among the certificate holders according to their respective interests. If they had succeeded in exchanging the claims which had been surrendered to them by creditors for stock of the company, the trust fund which they would have distributed would have been the stock of the company, and the certificate holders would have become stockholders whose rights would have been subordinate to the existing mortgages upon the property. The holders of construction bonds who had surrendered a third of their holdings under the agreement would have occupied the position of stock-

holders for the amount surrendered, but their rights as bondholders for the unsurrendered two-thirds of their bonds would have remained the same as before." Again: "There is not a word in the agreement to indicate that they could purchase the road discharged of the equitable lien of those who had surrendered a portion of their bonds in order that the remaining part should be more safely secured. . . . The trustees did not purchase upon the foreclosure of the second mortgage because a sale of the property was imminent. They did so because a sale, and a purchase by them under such a sale, would afford a convenient method of closing out their trust, and enable them to convey a satisfactory title to the new corporation. Of course, they occupy no better position towards the complainant than they would if they had purchased pursuant to the conditions of the trust. They now insist, as they have insisted all along, that they owe no duty to the complainant, and that no one had any right to share in the proceeds of the trust fund arising under the agreement except certificate holders, or in the distribution of the property which they acquired by purchase. It does not follow because the complainant had no interest in the trust fund, and was not entitled to share in its distribution after he had parted with his certificate, that the trustees owed him no duty respecting the unsurrendered two-thirds of his bonds. They undertook to become his trustees for the purpose of protecting, as well as could practically be done, his interest as a secured bondholder of the company, to the extent of two-thirds of his original security, in consideration of his becoming a subscriber to the agreement."

On the other hand, the contention of the trustees, from the outset, was that the securities received by them and those they purchased were to be held for the exclusive benefit of certificate holders, and that they never became trustees for the plaintiff in respect to the six construction bonds not surrendered by him, and for which no certificate was issued.

Whether the view taken by the Circuit Court of the relations between the trustees and the complainant be correct or not, we do not deem it necessary to determine, for in our judgment the case must be disposed of without considering that question, namely, upon the ground that the plaintiff was not entitled to the interposition of equity in his behalf. His bill should have been dismissed without prejudice to an action at law. It is impossible to doubt that he was fully informed of every step taken by the trustees, from time to time, in the discharge of what they conceived to be their duty to certificate holders. He was not ignorant of the fact that the original agreement of 1858 was amended in important particulars in 1862 and 1863, and that, in virtue of the additional powers conferred by those amendments, the trustees, by purchases made prior to April 15, 1863, acquired the second mortgage bonds, and thereby obtained control of the foreclosure suit.

In November, 1866, he was present at a meeting of certificate holders, and mentioned to Campbell, who became a trustee in 1864, the fact that he held six construction bonds. Campbell replied that he knew nothing about the early workings of the trust, and would inquire into the matter. In January, 1867, the road and its appurtenances were sold, as he well knew, and were purchased by the trustees, and in December, 1867, he presented his six construction bonds to Campbell, the chairman of the trustees, and told him that he (Riker) wanted done for those bonds what was done for them in the agreement—meaning the agreement of December 15, 1858. Campbell, doubtless supposing that Riker meant to assert some interest in the property, replied to him that the bonds “were not worth a cent, as they were shut out by the sale” under the foreclosure decree. He was thus distinctly informed as early as December, 1867, that his claim upon the property acquired by the trustees for the certificate holders was disputed, but he took no steps to vindicate his rights, if any he then had. He was quiescent

until December 10, 1870, which was nearly four years after the purchase by the trustees, and nearly three years after they had conveyed it to a new corporation, the Ohio & Mississippi Railway Company. On that day he served a formal written notice upon Campbell, as chairman of the trustees, that he held and owned the six construction bonds (describing them), and demanded that Campbell pay or secure to him the aggregate of principal and interest then due on them—\$10,830. Then ensued another period of inaction, for the present suit was not brought until August 7, 1876—more than thirteen years after the trustees purchased the second mortgage bonds for the benefit of the trust; more than nine years after the purchase of the road at the foreclosure sale, for the benefit of certificate holders, and nearly nine years after the interview between the plaintiff and Campbell in which the latter told him that his bonds had been cut off by that sale, and were not worth anything.

The record discloses no element of fraud or concealment upon the part of the trustees, or of any of them. What they did was done openly, and was known, or might have been known, by the exercise of the slightest diligence upon the part of every one interested in the property of the old corporation. The plaintiff unquestionably knew, or could easily have ascertained, before the trustees bought the property at the foreclosure sale—at any rate before they transferred it to the new corporation—that their purchase would be and was exclusively for the benefit of certificate holders interested in the trust. Although his bonds had not then matured, he could have taken steps to prevent any transfer of the property that would impair his equitable rights in it, or instituted proper judicial proceedings, of which all would be required to take notice, to have his interest in the property adjudicated. He allowed the trust to be wound up and postponed any appeal to a court of equity, based upon an alleged breach of trust by the trustees, until six out of the seven original trustees had died. His laches cannot be ex-

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cused upon the ground that the trust assumed by the trustees was express or direct, for it is clearly established that the trustees, as early as December, 1867, denied and repudiated, as the plaintiff knew, the existence of any trust in relation to such of the construction bonds as the plaintiff did not surrender to them: *Speidel v. Henrici*, 120 U. S. 377; *Riddle v. Whitehill*, 135 U. S. 621; *Philippi v. Philippe*, 115 U. S. 151. We therefore incline to think that this suit cannot be excluded from the operation of the statute of limitations of New York, prescribing a limitation of six years for an action "upon a contract, obligation or liability, express or implied:" Civ. Code Proc. N. Y., in force prior to September 1, 1877; *Voorhees Code*, § 91 (4th ed.) 86; *Ib.* (5th ed.) 69, 70; *Miller v. Wood*, 116 N. Y. 351; *Carr v. Thompson*, 87 N. Y. 160; *Kirby v. Railroad Co.*, 120 U. S. 130, 139.

But without placing our decision upon that ground, and independently of the statute of limitations, the case is one in which a court of equity should refuse to interpose because of laches upon the part of appellant in asserting the rights he now claims. Looking at all the circumstances, particularly the nature of the property, good faith demanded that if he intended to question the right of the trustees to acquire, hold and transfer it for the exclusive benefit of certificate holders, he should have done so by formal proceedings, commenced within a reasonable time after he became cognizant of all the facts. The case is one peculiarly for the application of the rule that equity, in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations: *Harwood v. Railroad Co.*, 17 Wall. 79; *Oil Co. v. Marbury*, 91 U. S. 587, 592; *Hayward v. Bank*, 96 U. S. 611, 616; *Richards v. Mackall*, 124 U. S. 183, 187; *Hammond v. Hopkins*, 143 U. S. 224, 250. As observed in *Halstead v. Grinnan*, 152 U. S. 412, 416, "the length of time during which the party neglects the assertion

of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great and the relations of the defendant to the rights such that it would be inequitable to permit the plaintiff to now assert them."

The decree is reversed at the costs of the complainant, and the cause remanded with directions to dismiss the bill without prejudice to an action at law.

Reversed.

A delay to sue, even for a shorter time than that established by the statute of limitations may constitute such laches on the part of the plaintiff as will induce a court of equity to refuse relief. Each case stands upon its own facts and the equities developed therein: *Penna. R. R. Co.'s Appeal*, 125 Pa. 189; *Remington v. Rozell*, 106 Ib. 407; *Catlin v. Green*, 120 N. Y. 441; *Calhoun v. Millard*, 121 Ib. 69; *Bell v. Hudson*, 73 Cal. 285; *Reynolds v. Sumner*, 116 Ill. 58; *Eberstein v. Willets*, 134 Ill. 101; *Morse v. Seibold*, 147 Ill. 318; *Barbour v. Hickey*, 24 L. R. A. 763. This rule may be applied even where there is a statute of limitations as to equitable actions, in cases where a purely equitable remedy is invoked: *Beach*, Mod. Eq. Juris., § 20; *Calhoun v. Millard*, *supra*.

Trust—Equity practice—Oyer—Pleading—Statute of frauds.

HAMILTON v. DOWNER ET AL.

(Supreme Court of Illinois, October 29, 1894.)

[Reported 152 Illinois, 651.]

A promise by a debtor to pay his creditor out of specified property will not make the debtor a trustee of such property for the use of the creditor.

Casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust.

A devisee of property wrote letters to a creditor of the devisee's testate, recognizing the right of such creditor to resort to the devised property, expressing a desire to dispose of the property so as to pay the debt, and using other like expressions. *Held*, insufficient to manifest and prove a trust in the devised property, even though the creditor, because thereof, withheld the claim from probate until the statute had run.

The practice of allowing oyer is unknown in chancery, but the improper allowance of it under the facts of this case is not such error as to reverse the decree.

The defense of the statute of frauds, against an oral contract to convey land, can be made on demurrer only when it affirmatively appears from the bill that the agreement relied on is not evidenced by a writing signed.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county, the Hon. OLIVER H. HORTON, Judge presiding.

Bill by Robert M. Hamilton against Mary V. Downer and John S. Buhrer.

Affirmed.

Robert M. Hamilton, as executor of Jane Downer, deceased, filed this bill of complaint against Mary V. Downer and John S. Buhrer. The object of the bill was to charge a certain freehold estate and a certain leasehold estate with a trust. The Circuit Court sustained a demurrer to the bill,

and, appellant electing to stand by it, entered a decree dismissing it out of court. Thereafter, the Appellate Court affirmed the decree, and thereupon this further appeal was taken.

The material allegations of the bill are these: First, that on May 1, 1880, Samuel A. Downer made and delivered his promissory note for \$8,500, drawing six per cent. interest per annum, to Jane Downer, his sister; second, that on March 3, 1885, Samuel A. Downer died testate, and the owner of certain real and personal property, and left Mary V. Downer, his widow, as his sole executrix and sole devisee and legatee; third, that the principal of the \$8,500 note, and a large amount of accrued interest thereon, remain due and unpaid; fourth, that said note was not probated or allowed against the estate of said Samuel A. Downer, deceased; fifth, that adjudication was regularly made in the matter of said estate, and the executrix discharged, on March 27, 1887; sixth, that John S. Buhner is the son-in-law of Mary V. Downer, and acted as her agent in the transactions involved in the suit; seventh, that in 1889 Mary V. Downer conveyed the freehold estate and the leasehold estate in question to John S. Buhner, and that Buhner paid no consideration whatever therefor, and had notice of the rights and equities of Jane Downer; eighth, that the \$8,500 note was not filed for probate on account of certain representations and promises, upon which is based a claim that all the real estate of Samuel A. Downer, and its proceeds, are held by appellees in trust for the payment of the note. The averments of the bill in regard to the trust are as follows: "And your orator further shows: That after the death of the said Samuel A. Downer, and after the appointment of the said Mary V. Downer as executrix as aforesaid, and in order to induce the said Jane Downer to refrain from filing her said claim against said estate in the Probate Court of Cook county, the said Mary V. Downer, executrix and sole devisee as aforesaid, and the said John S. Buhner, as agent

of the said Mary V. Downer, with the knowledge and consent of the said Mary V. Downer, undertook and promised to the said Jane Downer, in writing, that she, the said Mary V. Downer, would pay the said claim of the said Jane Downer out of the estate of the said Samuel A. Downer, deceased, devised to her as aforesaid, or out of the proceeds of the sale thereof; that the said Jane Downer should have a voice in the matter of the disposition to be made of the property so held by the said Mary V. Downer as aforesaid. That by reason of such undertaking and promise the said Mary V. Downer took the property of the said estate devised to her as aforesaid, and holds the same and the proceeds thereof charged with a trust in favor of the said Jane Downer for the payment of the said claim of the said Jane Downer against the estate of the said Samuel A. Downer, deceased. That the said Jane Downer, having confidence in the said undertaking and promise of the said Mary V. Downer and John S. Buhrer, and relying thereon and upon said trust created in her favor as aforesaid, refrained from filing her said claim in the Probate Court of Cook county until after the expiration of two years from the time when letters testamentary issued to the said Mary V. Downer as aforesaid, whereby the said Jane Downer lost all remedy against the said estate of the said Samuel A. Downer, deceased. That the said Jane Downer so refrained from filing her said claim in the said Probate Court solely with intent and desire to enable the said Mary V. Downer to avoid making a forced sale of the property of the said estate, and thus save for herself, the said Mary V. Downer, some portion of the said estate after the payment of the claim of the said Jane Downer as aforesaid." The court, upon motion of appellees, made an order requiring appellant to file a copy of the writing upon which the alleged trust was based. Appellant complied with the order by filing copies of certain letters—one written by Mary V. Downer and the others by John S. Buhrer. And thereupon appellees cravedoyer of

the letters and writings, and incorporated them into the demurrer which they filed.

Swift, Campbell, Jones & Martin, for appellant.

Ashcraft & Gordon, for appellees.

BAKER, J. (after stating the facts).—Three questions arise upon the record, and they are these: (1) Do the allegations of the bill, ignoring the letters set out in the demurrer, show a trust, and warrant equitable relief? (2) Did the court, in requiring appellant to file copies of the letters, and in allowing oyer and demurrer, commit such an error as should now reverse the decree? (3) Do the letters create a trust, or manifest and prove a trust? We will consider these questions in their order.

1. Immediately upon the death of Samuel A. Downer, the title to all the real estate of which he died seized vested in Mary V. Downer the devisee under his will. The debt due Jane Downer was a charge upon it in the hands of Mary V. Downer. Jane Downer had a complete and ample remedy at law for the enforcement of such charge, by filing her claim in the Probate Court, and having it allowed against the estate of the deceased. If it has ceased to be a charge through her failure to pursue in due time the remedy given by the statute, a court of equity will render her no assistance: *Blanchard v. Williamson*, 70 Ill. 647; *Harris v. Douglas*, 64 Ill. 466; *Armstrong v. Cooper*, 11 Ill. 560; *Freeland v. Dazey*, 25 Ill. 294. It is insisted, however, that an express trust was created, that secures the payment of the \$8,500 note and interest, and that the subjects of the trust are the real estate that was devised by the testator, and its proceeds. If this be so, then, of course, a court of chancery is the proper forum in which to enforce such trust. The averments of the bill are, in substance, that Mary V. Downer undertook and promised Jane Downer, in writing, that she (Mary V. Downer) would pay the said claim of Jane Downer out of the estate of Samuel A. Downer, devised to her, or

out of the proceeds of the sale thereof, and also promised that Jane Downer should have a voice in the matter of the disposition to be made of the property so devised. The demurrer admits that Mary V. Downer made such promises. The allegations amount to this: that Mary V. Downer promised to pay the note out of certain specified property owned by her, or out of the proceeds derived from a sale thereof, and that Jane Downer should be consulted when it was sold. When one simply makes a promise to pay his or her creditor out of his or her property, or a designated part of it, or out of the proceeds of the same, we do not understand that he or she becomes a trustee of such property for the use of such creditor, so that when the claim is barred by a statute of limitations the property or its proceeds can be followed, and the debt collected, on the theory of a trust. There is nothing shown on the face of the bill that would have prevented Jane Downer, even if she desired to avail of the promise, from probating her claim. The averment simply is that Mary V. Downer made the promise in order to induce Jane Downer to refrain from filing her claim against the estate in the Probate Court. The pleading is to be taken most strongly against the pleader. The averment merely states the motive that influenced Mary V. Downer in making the promise. This is wholly immaterial, as the motive which impelled her could not possibly have influenced Jane Downer in failing to file the claim. It is not alleged that the promise was made in consideration that Jane Downer would not exhibit her claim, or on condition she would not exhibit it, or that the promise was that Mary V. Downer would pay the note out of the real estate or its proceeds if Jane would not file it. We understand the rule to be that casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust: 1 Perry, Trusts, § 77. Our conclusion is that the bill, upon its face, does not show a case to justify the interposition of a court of chancery.

2. The practice of allowing oyer, and the setting out in the demurrer of the writing or writings of which oyer is craved, is unknown to the chancery practice. Section 1 of the Act to regulate the practice in courts of chancery (1 Starr & C. Ann. St., ch. 22) provides that, where no provision otherwise is made by the statutes, the courts having jurisdiction as courts of chancery shall proceed "according to the general usage and practice of courts of equity;" and § 2 gives them power to establish rules of procedure, and make needful orders and regulations, such rules, orders and regulations, however, to be "consistent with the practice of courts of chancery." See *McClay v. Norris*, 4 Gilman, 370. We have no authority to abrogate these statutory requirements, even if we felt inclined so to do. The practice, therefore, that obtained in that behalf in this suit in equity, was improper. But, under the circumstances of the case, it is not reversible error. As we have already seen, the suit, without the letters, had no feet to stand on, and so the oyer and demurrer worked no injury to appellant. And besides this, although one of the assignments of error is that the court below granted oyer of writings, yet, as we understand counsel, this assignment is waived by appellant, inasmuch as he says in his brief that if the court can fully take into account the documents exhibited in the demurrer, and give to them the same effect as if they were in evidence or were set out in the bill, then appellant desires that they shall be so taken into account, and that thus a decision shall be rendered upon the present hearing which shall be as nearly a final decision as a decision upon a demurrer can ever be. The letters being treated by consent of both parties as read into the bill by the oyer and demurrer, and the matter having been so regarded and considered by both the Circuit Court and the Appellate Court, we can see no serious objection to that course being pursued.

3. This brings us to a consideration of the letters. There are some twenty-three of them. One of them was written

by Mary V. Downer, and the others by John S. Buhrer "as her agent," and with her "knowledge and consent." In respect to these latter, it is suggested by appellees that since there is nothing on the face of the bill to show whether Buhrer was authorized in writing or not, and since the bill is to be taken most strongly against appellant, it must be presumed that the authority was a mere verbal authority, and within the statute of frauds. This claim is not well founded. The benefit of the statute of frauds, as a defense, can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied on is not evidenced by a writing duly signed: *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283. The case of *People v. Swigert*, 107 Ill. 494, is not here in point, since no question of the statute of frauds was there involved. For the purposes of the decision, then, we proceed upon the assumption that all the letters are out of the statute, and are to be regarded as the letters of Mary V. Downer. It would require much space to set out the letters in full, or even give a synopsis of their contents. The portions of them that are deemed material, and that are relied on by appellant, are quoted at length in the Appellate Court opinion: 46 Ill. App. 542. Suffice it, then, to say that we are of opinion that they do not make even as good a case for appellant as he alleges upon the face of his bill. The substance of them seems to be that appellees recognized the fact that Jane Downer had the right to resort to the property devised to Mary V. Downer in order to collect the debt; that they expressed the desire and the expectation that they would be able to so dispose of the property as to pay Jane Downer and the other creditors of the testator in full; that they tried in vain to induce Jane Downer to take the Indiana avenue house and lot, worth \$8,000, or more, in settlement of her debt; that both that property and the storehouse on leased lots were frequently without tenants and vacant; that considerable of the property was absorbed in the payment of taxes, ground-rents, repairs,

mortgages, interest, commissions and insurance, and debts of the testator, and in the support and maintenance of Mary V. Downer and her family. In our opinion the letters do not manifest and prove a trust, and it is not fairly deducible therefrom that it was the intention of the parties to create a trust. The judgment of the Appellate Court is affirmed. Affirmed.

This case must be distinguished from those in which it is held that a promise made by a devisee to the testator to apply part of a devise to the payment of a debt of the testator renders the devisee a trustee to that extent; here we have a mere oral promise to pay the debt of another, which would be unenforceable by reason of the statute of frauds, and which is not converted into the assumption of a trust by the fact that the land or the proceeds, out of which the promisor undertook to pay, came to the promisor from the testator, to whose creditor the promise is made. See *Slocumb v. Marshall*, 2 Wash. C. C. 398; where it is said by WASHINGTON, J.: "The attempt to create or enforce a specific trust from the loose and equivocal expressions of the parties made at different times and upon different occasions would be inconsistent not only with the spirit and policy of the statute of frauds, but with the general rules of evidence;" and see *Bayley v. Boulcott*, 4 Russ. 345; *Latta v. Kilbourn*, 150 U. S. 524. It seems that to turn a promisor into a trustee *ex malificio*, it must appear that at the time of his promise he intended not to perform it, and that the promisee was induced to part with property on the faith of the promise: *Piedmont L. & I. Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 289; *Brown v. Doane*, 86 Ga. 32.

Fraudulent conveyances—Mortgages—Consideration—Redemption.

STRIEBY ET AL. v. CLINTON HILL LUMBER AND MANUFACTURING COMPANY.

(Court of Chancery of New Jersey, June 23, 1894.)

Two things are indispensably requisite to render a transfer of property, absolute upon its face, a mortgage: First, the transfer must be made to secure the payment of a debt or the performance of a duty; and, second, a right of redemption must exist in the mortgagor.

Bill by Jonathan F. Strieby and others against the Clinton Hill Lumber and Manufacturing Company, on final hearing, on bill, answer and proofs. Decree for complainants.

James E. Howell and *John O. H. Pitney*, for complainants.
Samuel J. MacDonald, for defendant.

VAN FLEET, V. C.—The complainants are judgment creditors of Frank D. Holloway. They bring this suit to procure a decree setting aside, for fraud, a bill of sale made by Holloway, by which he transferred all his property to the Clinton Hill Lumber and Manufacturing Company. The following facts are undisputed: Holloway commenced business as a dealer in lumber, in Newark, in September, 1892, and continued such business for about five months, and until January 23, 1893, when he transferred to the defendant the lumber in his yard and that in course of transportation, and also the good-will of his business, and everything else belonging to it, including his accounts receivable. The debts on which the complainants' judgments are founded were contracted by Holloway in the purchase of lumber during the five months he was engaged in business, and a part of the property which he transferred to the defendant consisted of lumber which he had pur-

chased of the complainants. The defendant was organized on the very day that the transfer was made. At that time the defendant was without a penny in its treasury, as well as wholly destitute of assets of any other kind. Though the answer alleged that four hundred and five shares of stock, at \$100 each, were subscribed for the day the defendant was organized, so far as it appears not a single dollar in money has ever been paid on the subscriptions. The defendant has never acquired any property of any kind except that which Holloway transferred to it, and about \$3,000 worth of lumber, in addition, which Holloway had purchased just prior to the transfer, and which was delivered to him on the guaranty of a third person that it should be paid for. The value of the property transferred, as ascertained and settled by Holloway and a representative of the defendant, was \$15,100; but the defendant made no agreement or promise, either before or after the transfer, to pay that sum or any other for it in money; and the defendant has never paid a dollar for it in money. All that the defendant has ever given in exchange for the property is to issue eighty-two shares of its stock to one of Holloway's creditors. The circumstances under which the transfer was made, as described by the defendant in its answer, were these: Holloway commenced business with capital furnished by one William S. Ketcham, Sr. For more than a month prior to the date when the defendant corporation was organized, Holloway's business had come to a standstill, for lack of money to carry it on and to pay Holloway's debts. Ketcham refused to advance any more money. Holloway then proposed that a corporation should be formed, and agreed that, if it was, he would convey his assets and business either to Ketcham or to the corporation, and that, if the transfer was made to the corporation, the corporation should issue its stock to Ketcham for the value of the assets and business transferred; and Ketcham thereupon agreed that, on the transfer by Holloway of his assets and business to the cor-

poration, he would accept its stock at par for the value of the same. The corporation was formed and the transfer was made, as the answer alleges, to carry this arrangement into effect. The answer also says that Holloway was, at this time, insolvent, or, to quote the language of the answer, he "was entirely without means to pay said debts or to carry on said business." This arrangement, it will be noticed, made it the duty of the corporation to issue stock to Ketcham for the entire value of the assets and business transferred by Holloway, even if the sum due to Ketcham was much less than the value of the assets and business. At the time the transfer was made, the amount due from Holloway to Ketcham was a little less than \$9,610, and the value of the property he transferred was over \$15,000; so that, if the arrangement set forth in the answer had been carried out according to its terms, Ketcham would have received in defendant's stock, in payment of his debt, nearly \$5,400 more than was due to him. But the proofs show that this arrangement was not carried out. Only eighty-two shares of stock were issued to Ketcham. Forty were issued to him, and forty-two to two other persons, by his direction and on his account. Assuming, for present purposes, that these shares were a marketable commodity, and could have been put on the market and sold for par—a thing which it is almost absolutely certain could not have been done—it is manifest that, by means of the transfer, the corporation obtained from a debtor, in failing circumstances, property worth over \$15,000 for \$8,200, and that all of the debtor's creditors, except one, were defrauded to the extent of nearly \$7,000. William S. Ketcham, Sr., swears positively that the consideration which the defendant was to pay to Holloway for the property transferred was the amount of Holloway's indebtedness to him, and that there was no arrangement or agreement that anything more should be paid or given in case the value of the property exceeded the sum due to him from Holloway.

These facts, as I think, establish a plain case of fraud. The transaction was conspicuously fraudulent as against Holloway's creditors, both in its essential elements and in its result. By means of it, Holloway either gave away or attempted to conceal a large amount of property which his creditors had a right to have applied to the payment of their debts. But it has been suggested that the validity of this transaction should be upheld, even as against the creditors of Holloway, on the ground that the transfer to the defendant was made by way of mortgage to secure the debt which Holloway owed to Ketcham. There can be no doubt that a transfer absolute on its face may be shown to have been executed as a mortgage; but, to warrant a court in so changing the legal effect of such an instrument, clear and convincing evidence must be produced proving that, though the transfer is absolute in its terms, it was fully understood by both parties at the time of its execution that the relation of creditor and debtor should continue between them, and also that the debtor should have the right, on paying his debt, to have his property returned to him. Two things are indispensably requisite to render an absolute transfer a mortgage: First, the transfer must be made to secure the payment of a debt or the performance of a duty; and, second, a right of redemption must exist in the mortgagor. This case is not only destitute of the least evidence tending to show that it was understood that Holloway should have a right to redeem the property transferred, but all the circumstances attending the transfer—the nature of some of the property transferred, the person to whom the transfer was made, and the purpose for which it was made—go to show with almost conclusive force that it was intended to be absolute and unconditional. But if it were possible, under the evidence in this case, to change this instrument from an absolute transfer to a mortgage, I still think there would be strong reason to doubt whether there had been such an immediate delivery of the things mortgaged, followed by

such an actual and continued change in their possession as would, without a verification of its consideration, and without its being recorded, render the instrument valid against the creditors of its maker. The proofs show that the defendant took possession of the property transferred, not as mortgagee, or as the agent of a mortgagee, but as its absolute owner, and dealt with it and disposed of it as its owner. The complainants are entitled to a decree, with costs.

Where land is conveyed by an absolute deed, but is intended by the parties as a security for the payment of money or the performance of an act by the grantor, or some one for whom he becomes responsible, it is in equity a mortgage. The form is immaterial, the test is found in the intention that the deed shall be a security: *Hart v. Eppstein*, 71 Tex. 752; *Marshall v. Thompson*, 39 Minn. 137; *Holton v. Meighen*, 15 Ib. 69; *Hill v. Edwards*, 11 Ib. 22; *Weirde v. Gehl*, 21 Ib. 449; *Brose v. Page*, 32 Ib. 111; *Wright v. Mahaffy*, 76 Iowa, 96; *Lounsbury v. Norton*, 59 Conn. 170; *Kraemer v. Adelsberger*, 122 N. Y. 467; *Jenkins v. Stewart* (Ky.), 16 S. W. 356; *Florida First Nat. Bank v. Ashmead*, 23 Fla. 379; *Snow v. Pressey*, 82 Me. 552; *Lynch v. Jackson*, 28 Ill. App. 160; *Tedens v. Clark*, 24 Ib. 510; *Jameson v. Emerson*, 82 Me. 359; *Hall v. Arndt*, 80 Cal. 348; *Seawright v. Parmer* (Ala.), 7 So. 201; *Sanborn v. Magee*, 79 Iowa, 501; *Winnemucca First Nat. Bank v. Kreig* (Nev.), 32 Pac. 641; *Locke v. Moulton*, 96 Cal. 21; *Malone v. Roy*, 94 Ib. 341; *Tomkins v. Merriman*, 155 Pa. 440; *Reeder v. Trullinger*, 151 Ib. 287; *Watts v. Kellar*, 56 Fed. Rep. 1; *Doughty v. Miller*, 50 N. J. Eq. 529; *Cole v. Bolard*, 22 Pa. 431; *Wheeland v. Swartz*, 1 Yeates, 579; *Kelly v. Leachman* (Cal.), 29 Pac. 849; *Cook v. Bartholomew*, 60 Conn. 24; *Clark v. Woodruff*, 90 Mich. 83; *Murdock v. Clarke*, 90 Cal. 427; *Tarbell v. Vermont Mut. Fire Ins. Co.*, 63 Vt. 53; *Gamble v. Ross*, 88 Mich. 315; *Winters v. Earl* (N. J.), 28 Atl. 15; *Nelson v. Atkinson* (Neb.), 56 N. W. 313; *Helbreg v. Schumann*, 150 Ill. 12.

To constitute a deed a mortgage it is not necessary that there be an absolute covenant to repay the money loaned by the

grantee, if it be clear that by the agreement, pursuant to which the deed was executed, repayment was contemplated: *Macauley v. Smith*, 132 N. Y. 524. The law in North Carolina differs from the general rule, and it is there held that to convert a deed absolute on its face into a mortgage, it must be alleged and proved that the clause of redemption was omitted by ignorance, mistake, fraud or undue influence: *Norris v. McLane*, 104 N. Car. 159; *Green v. Sherrod*, 105 Ib. 197. In Pennsylvania, by an Act passed in 1881, a *parol* defeasance to a conveyance absolute on its face is declared void: *Molly v. Ulrich*, 133 Pa. 41. Where the form of an absolute deed is adopted with a fraudulent intent to cover a mortgage, equity will not declare the deed to be a mortgage: *Kitts v. Wilson*, 130 Ind. 492.

An absolute deed given in payment of a debt is not converted into a mortgage by an agreement on the part of the grantee that he will within an agreed period reconvey the property upon receipt of the debt with interest or of any other amount. If the debt be extinguished, so that there is no obligation on the part of the grantor to pay anything, there can be no mortgage, and the transaction becomes at most a sale with an agreement for a resale: *O'Reilly v. O'Donoghue*, Ir. Rep. 10 Eq. 73; *Turner v. Kerr*, 44 Mo. 429; *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilhac*, Ib. 75; *Baughner v. Merryman*, 32 Md. 185; *Weathersley v. Weathersley*, 40 Miss. 462; *Phipps v. Munson*, 50 Conn. 267; *Rue v. Dole*, 107 Ill. 275; *Bearss v. Ford*, 108 Ib. 16; *Bridges v. Linder*, 60 Iowa, 190; *Voss v. Eller*, 109 Ind. 260; *Knaus v. Dreher*, 84 Ala. 319; *Callahan's Estate*, 13 Phila. 381; *Randall v. Sanders*, 87 N. Y. 578; *Jones on Mortgages*, § 267; *Adams v. Pilcher*, 92 Ala. 474; *Fletcher v. Northcross* (Cal.), 32 Pac. 328; *Elston v. Chamberlain*, 41 Kan. 354.

If the grantor has the option of avoiding the deed, absolute on its face, by repaying the consideration within a limited time, but is under no obligation to pay, the transaction is a conditional sale and not a mortgage: *McCamant v. Roberts*, 80 Tex. 316; *Mason v. Moody*, 26 Miss. 184; *Eckert v. McBee*, 27 Kan. 232; *Clifford v. Gates*, 53 N. Y. S. R. 877; *Chandler v. Chandler*, 76 Iowa, 574; *Wilson v. Fairchild*, 45 Minn. 203; *Bowery Sav. Bank v. Belt*, 66 Hun, 57; *Reed v. Bond*, 96 Mich. 134; *Osborne & Co. v. Schoonmaker*, 47 Kan. 667; **Dignan*

v. Moore, 8 Wash. 312. If the evidence leave it uncertain whether the mortgage were intended as an absolute deed, the transaction will be allowed to stand as it appears upon its face. See *Becker v. Howard*, 75 Wisc. 415; *Gilchrist v. Beswick*, 33 W. Va. 168; *Bender v. Markle*, 37 Mo. App. 234; *King v. Graves*, 42 Ib. 168; *Shattuck v. Bascom*, 55 Hun, 14. *McNeil v. Auldridge*, 34 W. Va. 748, seems to be opposed to the current of authority. In *Bogk v. Gaseat*, 149 U. S. 17, where there was an absolute deed with an agreement to reconvey on payment of a sum equal to the purchase-price and interest, followed two days thereafter by a lease from the grantees, without proof of a debt or of a loan of money, the Supreme Court of the United States held that there was a case for the jury to determine whether the instruments were intended as a mortgage.

Equity—Adequate remedy at law—Multiplicity of suits.

DRUON *v.* SULLIVAN ET AL.

(Supreme Court of Vermont. General Term. August 25, 1894.)

A receipt was given by the orator for money left with him in trust by a father for his two children. The orator became indebted to the father, and gave a note covering the money specified in the receipt and the additional debt, and paid the note in full to the father's administrator. The receipt was not surrendered, and the children brought separate actions, returnable in different counties, for the money specified therein. *Held*, (1) that as the orator had a remedy at law in the actions pending, equity jurisdiction to decree cancellation would not be exercised; (2) that the case at bar presented no such multiplicity of suits as to require equitable interference on that ground.

Appeal in chancery, Franklin county, ROWELL, Chancellor.

Bill by Z. Druon against J. W. Sullivan, Mary Ann Sullivan and Thomas H. Brown for an injunction, and for can-

cellation of a receipt. Decree for orator. Defendants appealed. The facts are sufficiently stated in the opinion.

D. J. Foster, for appellants.

Stephen E. Royce, for appellee.

MUNSON, J.—The important facts stated in the bill and conceded by the demurrer are that in 1884, one John Brown, who was about to leave the country for a considerable absence, left with the orator the sum of \$300; that the orator was to hold this sum in trust, to return to said Brown if he should call for it, and to divide equally between his two children, the defendants Mary Ann Sullivan and Thomas H. Brown, if he should die abroad, leaving it in the orator's hands; that the orator gave the said John Brown a receipt "specifying that the orator had received said sum as aforesaid;" that, after said Brown's return, there were certain other transactions between him and the orator, from which a balance of \$200 was found due to Brown; that the orator thereupon gave said Brown his promissory note for \$500, which covered the above balance and the \$300 evidenced by said receipt; that after said Brown's decease the orator paid to his administrator and heirs the amount of said note, and received and canceled the same; that when said note was given the orator inadvertently neglected to take up and cancel said receipt, and that he understands it has since been found among the papers of the deceased, and is now in the possession of the defendants; that two suits in general *assumpsit* have been brought against the orator to recover the moneys specified in said receipt—one in favor of Mary Ann Sullivan, returnable in the county of Chittenden, and one in favor of Thomas H. Brown, returnable in the county of Franklin. The orator prays that the defendants be enjoined from the further prosecution of these suits, and from parting with the possession of said receipt, and that they be required to deliver up said receipt for cancellation.

The jurisdiction of equity to grant the remedy of cancellation is exclusive and unquestioned. Its jurisdiction in this behalf will always be exercised when the remedy is sought for the protection or support of an equitable right or interest. But when the remedy is sought in aid of a right which is available in a suit at law the jurisdiction will not be exercised, unless the legal remedy is deemed inadequate: Pom. Eq. Jur., §§ 221, 303, 914, 1363, 1377. It is true that a defense available at law, and in its nature adequate, is sometimes deemed an insufficient remedy, because of dangers which may arise from a delay in the prosecution of the claim. But no room is left for an exercise of the jurisdiction on this ground when there is an action at law pending, in which the defense can be made without delay: *Ib.*, §§ 179, 1363; *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 470. The facts stated in this bill will afford the orator a complete defense in the suits pending at law, and, if he is entitled to invoke the jurisdiction of equity, it must be upon the ground that judgments at law would not give him adequate protection. The orator insists that the suits brought against him, while proper for the recovery of the demands evidenced by the receipt, are of such a character that their determination will not protect him from further danger if the receipt be suffered to remain uncanceled. In cases where negotiable securities are claimed to have been obtained by fraud or conversion, the remedy of cancellation will not ordinarily be granted, unless applied for before the paper has matured: Pom. Eq. Jur., § 221. Some of the circumstances which may induce a court of equity to grant this protection against negotiable paper which has matured were considered in *Glastenbury v. McDonald*, 44 Vt. 450. It is said to be a rule generally adopted that a bill will not be sustained to cancel an executory, non-negotiable, personal contract, where the wrong complained of may be set up as a defense at law, unless there are "special circumstances which would prevent

the defense from being available, adequate and complete:" Pom. Eq. Jur., § 914, note. It is not claimed that the case presented by the bill discloses any circumstances of this character, except such as arise from the fact that the instrument is one that need not be specially declared upon.

The writing in question is evidently a non-negotiable paper, acknowledging the receipt of certain moneys, to be accounted for as therein stated. It is not a writing which it is essential to describe in the declaration, and it doubtless might be used in support of the action without being made a part of the files. It is claimed, therefore, that after judgments in the suits at law the receipt might remain in the possession of the defendants, without there being anything in the judgment records to show that it had been the subject of adjudication, and that the danger to which the orator would be exposed by the continued existence of the receipt under these circumstances is a sufficient ground for withdrawing the litigation from the courts of law. It is claimed, in effect, that the equitable power of cancellation should be exercised in all cases where the declaration at law is such that the record of the judgment will not show that the instrument was embraced in the adjudication. The most that can be suggested in support of an exercise of the jurisdiction in this case is that the defendants may endeavor to sustain their suits without producing the receipt; that if the receipt be used the records will not identify it as the one produced in support of the claims; that it cannot be made a part of the files in both cases, and may not be left in the files of either; that if left in the possession of the defendants, they may hereafter produce it in support of a further demand; that it may in course of time fall into other hands, and be made the basis of other suits in defendants' names. It will be seen that the danger is found by supposing something entirely at variance with the usual course of proceedings. Ordinarily, such a receipt will be produced in evidence, and when produced will be marked as an exhibit in

the case, and, if withdrawn for other use, will carry with it the marks of its connection with that case. Moreover, upon a call for a specification, such a receipt would ordinarily be referred to in the specification furnished as fully as a promissory note would be. If a specification of this character should not be furnished under the rule, it is to be expected that upon proper application the law court would take such action as would result in placing in the files a complete description of the receipt. In view of all this, it cannot fairly be urged that judgments in the suits at law will not afford the orator adequate protection. If, upon a proper application, the law court should fail to procure the filing before trial, of a specification of the character indicated, the orator might then be entitled to equitable interference. Suggestions similar to those relied upon by the orator might be made in regard to promissory notes. A note is frequently the basis of more than one suit. The debt evidenced by it may be recovered under the common counts. The note may not be properly marked, or preserved in the files, or identified by specification. There is always a possible danger that a promissory note recovered upon in general *assumpsit*, and not actually destroyed or canceled, may, through some carelessness or corruption, pass from official custody, and be made the basis of another suit. But remote possibilities of this character are not sufficient ground for granting the aid of equity, in derogation of the jurisdiction of the courts of law. The jurisdiction of cancellation should be exercised only in cases where there is some reasonable apprehension of danger. The remedy at law is adequate if it leaves no reasonable ground for apprehension. It is difficult to say, upon the facts stated in this bill, that there is any reason to apprehend that the orator will be exposed to danger because of this receipt after the determination of the suits at law, unless from a lack of vigilance in the conduct of his defense. We do not consider the suggestions made sufficient to justify the adoption

of a rule which would serve, in a considerable class of cases, to transfer the litigation from the country of the plaintiff to that of the defendant, and from the forum of a jury to that of a master.

Nor do we think the case presents such a multiplicity of suits as will justify the interference of equity. The subject-matter of the litigation is not one that permits of actions by a considerable number of persons, or of successive actions by the same person. The orator is sued by two persons who hold separate demands against him, evidenced by his personal obligation. We do not think that the fact that the orator's acknowledgment of these separate demands is contained in the same writing entitles him to equitable relief against the two suits. Decree reversed, demurrer sustained and cause remanded.

Taft, J., dissents.

NOTE.—Arguments were had in this case at the Franklin county term in 1890, and at the general terms in 1890 and 1891. The agreement of a majority to a disposition of the case was first obtained at the general term, 1893.

The mere fact that a defense exists to an instrument, is not sufficient to move a court of equity to decree cancellation thereof, when the defense is one which can be taken advantage of at law, in case an action be brought upon the instrument itself: *Town of Venice v. Woodruff*, 62 N. Y. 462; and a court of equity will not enjoin an action on grounds which can be used as a defense therein: *Hapgood v. Hewitt*, 119 U. S. 234; *Bergen v. Jeffries*, 80 Ala. 349; *Redd v. Blandford*, 54 Ga. 123; *Olmstead's Appeal*, 86 Pa. 284; *Brown's Appeal*, 66 Ib. 155; *Minnig's Appeal*, 82 Ib. 373; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Beauchamp v. Putnam*, 34 Ill. 378; *N. Y. D. D. Co. v. American, etc., Co.*, 11 Paige, 384; *Dayton v. Relf*, 34 Wisc. 86; *Smith v. Short*, 11 Iowa, 523; *Powell v. Chamberlain*, 22 Ga. 123; *N. W. R. Co. v. Barrett*, 65 Ib. 601; *Gibson v. Moore*, 22 Tex. 611; *Miller v. Palmer*, 55 Miss. 323; *Payson v. Lamson*, 134 Mass. 593; *Marlin v. Orr*, 96 Ind. 27; *Roemer v. Conlon*, 45 N. J. Eq.

234 ; Pullman Pal. Car Co. v. Central Transfer Co., 34 Fed. Rep. 357 ; Bostwick v. Covell, 24 Ib. 402 ; Drexel v. Berney, 16 Ib. 522 ; Matthews v. Dodd, 3 Del. Ch. 159 ; Beach, Mod. Eq. Jur., § 654 ; Chase v. Chase, 50 N. J. Eq. 143 ; Cohen v. L'Engle, 29 Fla. 579. That the proceedings at law are summary, and therefore not so favorable to the making of a defense, which is within equitable jurisdiction, may induce the court to interfere : Henwood v. Jarvis, 27 N. J. Eq. 254.

Water companies—Municipalities—Franchise—Appeal.

ANDREWS ET AL. v. NATIONAL FOUNDRY AND PIPE WORKS, LIMITED.

(United States Circuit Court of Appeals, Seventh Circuit.
January 11, 1894.)

[Reported 61 Federal Reporter, 782.]

A water company mortgaged, with covenants of warranty, "all the rights, privileges, immunities, franchises and powers which were granted in and by" a certain city ordinance. *Held*, that the mortgage covered all franchises owned by the company and enumerated in said ordinance, whether the same were in fact granted by the city or by the state.

A city whose charter gives it "the general powers possessed by municipal corporations at common law," and also gives it express power "to provide for the erection of water-works," has power to grant to a corporation a franchise to supply the inhabitants of the city with water.

A preliminary injunction made upon a *prima facie* showing is an "interlocutory order" of injunction, from which an appeal to the Circuit Court of Appeals will lie : Richmond v. Atwood, 5 U. S. App. 151, 2 C. A. 596, and 52 Fed. 10.

A decision on appeal, reversing an order granting a temporary injunction, is conclusive only of the rights of the parties upon the showing made in support of the order.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Creditor's bill by the National Foundry and Pipe Works, Limited, against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb, Charles C. Garland, F. H. Todd, George W. Sturtevant, Jr., S. W. Ford, Matt. S. Wheeler, A. J. Elkins, N. S. Todd, Minneapolis Trust Company, Oconto National Bank, City of Oconto and Oconto City Water-Supply Company.

An order was entered appointing a receiver for the property of the water company and restraining the defendants from interfering therewith. Defendants Andrews and Whitcomb appealed.

Before WOODS, Circuit Judge, and BUNN and BAKER, District Judges.

The facts appear from the following statement of facts by the court:

"This appeal is from a preliminary order of injunction granted in connection with an order appointing a receiver of the property and effects of the Oconto Water Company. By the terms of the order, the appellants, Andrews & Whitcomb, with others, were restrained 'from holding, managing or interfering in any way with the rights, franchises, property, rents, profits, bonds and affairs of said Oconto Water Company and the said water plant in the hands of said receiver, and from asserting any right, title or interest in the property or the rents, issues and profits thereof, until the further order of the court.' When this order was made, Andrews & Whitcomb were in possession of the water-works, claiming title by purchase at a foreclosure sale under a mortgage made them by the Oconto Water Company to secure the repayment of money loaned which was used in the construction of the plant. The appellee, at whose instance the receiver was appointed and the injunction granted, was a judgment creditor whose execution had been returned unsatisfied. For a detailed statement of the facts, reference is made to the opinion delivered in the Circuit Court, reported in 52 Fed. 29. The mortgage under which

the appellants assert title was executed in pursuance of the contract of September 13, 1890, whereby it was agreed that there should be a transfer in trust to the appellants 'of the Oconto water-works franchise as issued to said Oconto Water Company;' but, by its own terms, the mortgage or deed of trust was of 'all the rights, privileges, immunities, franchises and powers, of whatsoever name or nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of said city on the ninth day of July, A. D. 1890, being ordinance No. 153,' etc.; following which the mortgage proceeds to say: 'To have and to hold the said rights, privileges, immunities, franchises and powers, and each and all thereof, unto the said Andrews & Whitcomb, and unto their heirs and assigns forever; and the said Oconto Water Company, for itself and its successors, hereby covenants and agrees to and with the said Andrews & Whitcomb that it has good right and lawful authority to sell, assign, transfer and set over in the manner aforesaid all of said rights, privileges, immunities, franchises and powers, and that it is the owner and holder of all thereof on the date hereof.' The 1st section of the ordinance contains the granting clause, and reads as follows: 'Section 1. That the Oconto Water Company, its successors and assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain and operate water-works in the city of Oconto, to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes, bridges or public grounds of the city as now or may hereafter be laid out, to acquire and hold as by law authorized any and all real estate, easements and water rights, necessary to that end and purpose, with all necessary and proper buildings, wells, conduits or other means of obtaining water supply, with all necessary machinery and attachments thereto to supply the city and inhabitants thereof with good and wholesome water, suitable

for fire and domestic purposes, and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge or public ground under control of the city, to take up any pavement or sidewalk thereon, and make such excavations as may be necessary for the laying of such pipes and attachments; provided, that such use of such ground be made with the least practical inconvenience to the inhabitants of said city; that such excavations be guarded by barricades wherever necessary and lighted at night, and that such sidewalk, pavement or excavation be replaced by and at the expense of the grantee, its successors or assigns, in as good condition as before, as nearly as practicable, and with the least possible delay. Said grantee and its successors or assigns shall assume all risk of accidents arising from the construction and operation of said water-works and shall save the city harmless from all damages therefor.' The city of Oconto by its charter (chapter 56, Laws Wisc. 1882) is given 'the general powers possessed by municipal corporations at common law,' and among other specified powers is authorized 'to enact, enforce, alter, amend and repeal ordinances, rules and by-laws, for the benefit of the trade, commerce and health,' and 'to provide for the erection of water-works for the supply of water to the inhabitants of the city.' By § 930 a of chapter 125 of the Acts of 1879, every city in Wisconsin was authorized 'to permit,' subject to rules and conditions of its own choice, 'the laying of pipes in the streets and alleys and the maintenance and use of such pipes for the purpose of conveying water,' etc.

"The Oconto Water Company was incorporated July 8, 1890, under the general law of the state, which required the articles of incorporation to contain a statement 'of the business or purposes' of the organization; and, in compliance with that requirement, the articles stated that this company was formed 'for the purpose of constructing and operating a system of water-works within the city of Oconto, in Wisconsin, for supplying said city and its inhabitants

with water for protection against fire, and for domestic, manufacturing and other purposes.' Upon an analysis of the several statutes and the ordinance referred to, the court below reached the conclusion that the water company received its franchises directly from the state, and not from the city under the ordinance mentioned, and that the mortgage and the decree of foreclosure and sale thereunder, limited as they were by their terms to franchises granted by the ordinance, vested the appellants with no interest in the property or franchises of the water company. Upon this point the court said: 'At the threshold of the inquiry the court is confronted with the question what rights Andrews & Whitcomb acquired under the agreement of September 13, 1890, the instruments executed in pursuance thereto, and the foreclosure of the rights thereby acquired. The grant to them was of "all the right, privileges, immunities and powers, of whatever name or nature, which were granted unto the said Oconto Water Company by the ordinance of the city of Oconto." What rights' could the city lawfully grant, and what were granted? The solution of the question depends upon the powers conferred upon that municipality. The city by its charter is vested with the general powers possessed by municipal corporations at common law, and with certain governmental powers specifically defined in its charter, and with authority to enact and enforce ordinances under the "general welfare" clause usual in charters of municipal corporations, and specific power is vested touching various matters of municipal concern: Laws Wis. 1882, c. 56. The general power is conferred upon cities to borrow money and to issue negotiable bonds for the purchase or erection of water-works: Rev. St. Wis., § 942. By chapter 125, Laws 1879 (Sanb. & B. St., § 930 a), the common council of every city is authorized to permit, subject to such rules and regulations as may be imposed, the laying of pipes in the streets of the city, and their maintenance and use, for the purpose of conveying water or steam under the surface

of the streets. By the general statute entitled "Of Cities" (Laws 1889, c. 326 ; Sanb. & B. St., c. 40 a), cities are authorized to own and operate water-works, and to legislate on all matters with reference to their construction, operation, management and protection (§ 925 N). In the chapter entitled "Organization of Corporations" (Rev. St. Wis., c. 86), under which the Oconto Water Company confessedly had being, it is enacted that "any corporation formed for the purpose of constructing and operating water-works in any city or village of this state, may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon, and may, by the consent of and in the manner agreed upon, with the proper authority of such city or village, use any street, alley, lane, park or public grounds for laying water pipes therein . . . and any such city or village may, by contract duly executed by the proper authorities, acquire the right to use the water supplied by such corporation, or such portion thereof as it may desire, upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village." Section 1780, as amended. These are all the statutory provisions which I have been able to find touching the question of municipal authority and corporate franchise here presented.

"It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted or fairly to be implied. It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water ; but it cannot, without express legislative authority, construct, maintain or operate water-works: Dill. Mun. Corp. (4th ed.), § 27. Without like authority it cannot grant exclusive right to use the streets,

and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority, directed, granted or delegated to municipalities. So, likewise, the right to operate water-works is of legislative origin, and can only be conferred by a municipal corporation when expressly authorized by the supreme legislative power of the state. It cannot be doubted that the common council of the city of Oconto, in the enactment of the ordinance in question, entertained a broad and generous view of its own powers. It was pleased to confer, or attempt to confer, upon this water company, the power "to construct, own, maintain and operate water-works in the city of Oconto . . . to acquire and hold, as by law authorized, all real estate, easements and water rights necessary to that end and purpose, with all necessary and proper buildings, with conduits or other means of obtaining water supply, with all machinery and attachments thereto," in addition to the right to use the streets and public grounds of the city for its water mains and pipes, and undertook to regulate contracts and dealings between the water company and the inhabitants of the city using water, and to bestow upon the company the right of access to the homes of consumers of water, and to regulate its exercise. If the right to confer these great privileges and franchises and to exercise inquisitorial powers, can be pointed out, the ordinance is effective to the end designed. No ordinance, however, can enlarge, vary or diminish the powers of a municipality.

"Whence came that power? I find no legislative warrant for it. The charter of the city does not confer it. No general law applicable to the city of Oconto grants it. The chapter entitled "Of Cities" (Sanb. & B. St., c. 40 a) was enacted in 1889 (Laws 1889, c. 326). It provides that no city then incorporated shall be affected by the provisions of the Act, unless it shall adopt the same for its government in the manner provided: Sanb. & B. St., § 925 d. The

present charter of the city of Oconto was enacted in 1882: Laws 1882, c. 56. There is no suggestion in the record that the city of Oconto has ever adopted the provisions of the general law, and we are not at liberty to assume that it has. Failing such adoption, the city is not affected by and derives no power from that general law, assuming that the chapter has relation to water-works owned and operated by a corporation other than the municipality, which may be doubtful. The city is therefore only authorized to permit the laying of pipes in the streets, and their maintenance and use: Sanb. & B. St., § 930 a. That is not a grant of power to bestow a franchise, but permission to suffer an easement. The law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the water-works, and (2) to use the streets of the city: *Ib.*, § 1780. The former power is without condition, the latter is subject to the assent of the municipality. The practical efficacy of the franchise may depend upon the discretionary act of the city. The franchise is not, however, derived from that discretion, but from the will of the Legislature. The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company; as to the use of the streets, becomes operative only upon the happening of that contingency of municipal assent. That is not a grant of power to a city to confer a franchise: *Sims v. Railway Co.*, 37 Ohio St. 556. The matter is somewhat analogous to the case of an Act of the Legislature taking effect only upon the assent of the people expressed at the polls, which is now generally held to be valid, upon the ground that the law derives its potency from legislative will, and not from the assent of the poll. So, here, the right to use the streets was conferred upon the Oconto Water Company by the law of its incorporation, subject to the contingency of the assent of the city. The franchise emanates from the Legislature, not from the municipality. The ordinance is not an exercise of legisla-

tive power, but of the right to contract: *City of Indianapolis v. Gas-Light Co.*, 66 Ind. 396.

“ ‘The case of *State v. Madison St. Ry. Co.*, 72 Wis. 612, 40 N. W. 487, is not in conflict. The ruling there was to the effect only that, considering the terms of Rev. St. Wis., § 1862, the provisions of the ordinance there under review, by force of the statute, became part of the law of the incorporation of the railway company, and for violation of such provision an action could be maintained by the attorney-general to vacate the charter or annul the existence of the railway company, under the provisions of *Ib.*, § 3241. Applying the doctrine of that case to the one in hand, the most that can be said is that the conditions of the assent of the city to the use of its streets inhere in and are part of the law of incorporation of the defendant water company. None the less, however, are its franchises derived from the Legislature, and not from the municipality. It is also to be noticed that there is a marked difference in the statute under consideration in that case and those in question here. Section 1862, there considered, provides that “any municipal corporation . . . may grant to any such corporation [a street-railway corporation] such use, and upon such terms as the proper authorities shall determine, of any streets or bridges. . . . Every such road shall be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance from time to time determine.” There the Legislature does not directly grant to the railway corporation any power to use the streets, but delegates to the municipality the right to grant the power. Here the power is in terms conferred by the Legislature upon the water company, subject to the assent of the municipality. There the street railway is subject to constant municipal control. Here the water company is independent of municipal direction except in the use of the streets. It is, I think, clear that the power possessed by the city of Oconto was only to yield its assent to a legislative grant of the use

of its streets, and to contract for a supply of water. The franchises of the water company were conferred by the Legislature of the state, and not by the ordinance of the city.

“ ‘The question then recurs, what rights passed to Andrews & Whitcomb under the instruments of transfer and their foreclosure? By their terms they convey or assign only such rights and privileges as were granted the water company by the ordinance of the city. No other franchise or rights are attempted to be conveyed. If the right to the use of the streets may be said to have proceeded from the municipality, it was, standing alone, a mere easement. The transfer of such naked right could not carry with it the ownership of the mains, nor the title to the plant as an entirety, nor the franchise to operate the plant, nor to the land upon which the plant was situated. So that if it be true, as is here claimed, that a naked franchise is transmissible, that the franchise is the main and the plant the incident, and that a transfer of the former carries with it the title to the tangible property essential to its use and beneficial enjoyment, it still remains that here there was no transfer of the franchise to operate the plant, and consequently no transfer of tangible property. It therefore results that the claim of Andrews & Whitcomb to the plant is unfounded in law, and its possession by them wrongful as against the complainant.’ ”

W. H. Webster, for appellants.

George H. Noyes, for appellee.

WOODS, Circuit Judge (after stating the facts as above).—Without regard to the question whether the Oconto Water Company received its franchises directly from the state, or indirectly through the city of Oconto, by force of the ordinance which purported to grant them, we are of opinion that the mortgage in question may be upheld. The appellants, it is not disputed, advanced large sums of money to the water com-

pany in the belief that they were receiving a valid security ; and, while they are presumed to have known the law, it is not to be presumed, if there is reasonable escape from it, that either party to the transaction intended a vain thing. "*Interpretatio facienda est ut res magis valeat quam pereat*," and other familiar maxims lend support to the requirement that a contract or deed shall be so construed as to have effect rather than so as to be made void. By the literal terms of the mortgage and of the decree of foreclosure, upon which the title of the appellants depends, there was a conveyance or assignment of "all the rights, privileges, immunities, franchises and powers, of whatever name or nature, which were granted in and by that certain ordinance," etc., and if, upon a proper interpretation of the statutes touching the question, no mortgagable right, privilege or franchise was granted in or by the ordinance, as distinguished from a direct grant by the state, then by a strict construction the mortgage was, as it was held to be, ineffective and meaningless. But not by the words alone should a writing be interpreted. "The rule is to regard the intention rather than the words ;" and here the evident intention, deducible from the whole instrument, was to mortgage the rights and franchises which the ordinance granted in terms, or which it purported to convey. The resolution whereby the water company declared its acceptance of the ordinance, and "of the franchise thereby granted," shows that both parties entertained an equally broad and generous view of the powers of the common council of the city in the premises ; and, when the deed of trust came to be drawn, it was only natural that for certainty of description reference should be made to the ordinance by which the rights of the company were defined, and, as the parties supposed, were granted. And even if this supposition was mistaken, must it be held that the entire purpose of the parties failed and that notwithstanding the covenant of the water company that it was "the owner and holder," and had "good right and lawful

authority" to make transfer and sale "of said rights, privileges, immunities, franchises and powers," "in the manner aforesaid," yet the instrument is a total nullity? Indeed, why should it not be held that by that covenant the water company is estopped to deny that its franchises were granted by the ordinance? Or must it be said that the covenant covers only rights and franchises which were granted by the ordinance, and, like the granting clause, is itself void because no franchise came to the company in that way? It would seem more reasonable, the ordinance having been made a part of the deed by reference, as if copied into it, to treat the covenant as covering the rights and privileges named in the ordinance, whether derived from one source or another. To say the least, upon the whole instrument, it is only reasonable and in accord with the canons of construction to read the expression, "which were granted," etc., as if it were, "which in terms were granted unto the said Oconto Water Company in and by that certain ordinance," etc. The added words are fairly implied, and the addition, without doing violence to any part of the writing, gives effect alike to the words of grant and covenant, and accomplishes the evident purpose for which the deed was executed.

But, if compelled to put upon its terms a strict and literal construction, we should still consider the mortgage valid, because we are not able to agree that the Oconto Water Company, by force of the ordinance, received no right, privilege or franchise which was capable of being mortgaged, and which could be properly described as granted in or by the ordinance. While "it is essential to the character of a franchise," as was held in *Bank v. Earle*, 13 Pet. 595, "that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state," and while the right to the use of the public streets of a city by a gas company or water company, for the purpose of laying down its pipes, is gen-

erally considered to be such a franchise, it is well settled that the Legislature of a state may confer the power to grant such franchises upon municipal corporations; though, when so granted, they are, nevertheless, to be regarded as derived from the state. The question here, therefore, is not whether the franchises of the Oconto Water Company were obtained from the state; they necessarily came, directly or indirectly, from that source. It is whether or not the common council of Oconto had been given the power to grant such franchises, and in this instance did grant those named in its ordinance. Without that ordinance, it is clear the water company could not lawfully have laid its pipes in the streets of the city, nor have put into practical effect its "franchise to operate the plant,"—if it can be said to have had such franchise, by reason merely of its act of incorporation, and before the ordinance was passed. The city of Oconto, by its own charter, had the power, and therefore was under the duty, of caring for the public health. That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such a contract would, of necessity, carry with it the right, on the part of the contractor, to lay the pipes and to operate the plant. Such right is a franchise, and, the making of the contract operating by necessary implication as a grant of the privilege or franchise, the power given to make the contract was power to grant the franchise. But, besides the power to provide for the health of its inhabitants, the city of Oconto had the express power, apparently not brought to the attention of the court below, "to provide for the erection of water-works for the supply of water to the inhabitants of the city." We do not agree with the suggestion of counsel that by this provision the city had no right to contract for a supply of water, and was authorized only to construct and operate a plant of its own. The authority extended to any reasonable method; and it follows that, before the Oconto Water Company was incor-

porated, the city of Oconto, by its own charter, had power, from the state, to grant franchises like those in question to any person or body capable of receiving them. By its act of incorporation the Oconto Water Company came into being, endowed, not with the right to establish and operate water-works in Oconto, but with capacity to receive and exercise that right or privilege upon such terms as the city should consent to grant. But, though capable of receiving, it could acquire no complete or effective right of franchise without the consent, and there is no impropriety, legal or verbal, in saying without the grant, of the city. The ultimate source of such franchises in all cases being the state, the difference between a municipal power to grant them and authority to contract for or to consent to the exercise of them is a difference of words rather than of substance. The language of the Court of Appeals of New York in the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, is pertinent. Speaking of the Broadway Surface Railroad Company, the court said:

“On May 13, 1884, that company filed articles of association and became incorporated as a street railroad company under the provisions of chapter 252 of the Laws of 1884, a general Act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the Constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the Constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon

them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase."

So, here, not by reason of a constitutional provision, but by statute, the ultimate efficient right could only be acquired by act and consent of the city authorities, which they could grant or refuse at their pleasure.

Whether or not, and to what extent, the mortgage of the franchises covers the plant of the company, need not now be considered.

The objection is made that the statute authorizes an appeal only from an "interlocutory order" of injunction granted "upon a hearing in equity;" that the order in this case was a preliminary one, made upon a *prima facie* showing, and is not appealable; but we concur in the opinion of the Court of Appeals for the First Circuit that the statute was intended to extend the right of appeal "to all that class of interlocutory orders or decrees [of injunction] which interfere with the possession of property or operate in the restraint of trade:" *Richmond v. Atwood*, 2 U. S. App. 151, 2 C. C. A. 596, and 52 Fed. 10. The order granting an injunction should be set aside, and it is so ordered.

ON REHEARING.

(June 11, 1894.)

Before HARLAN, Circuit Justice; Woods, Circuit Judge, and BUNN, District Judge.

WOODS, Circuit Judge.—"A rehearing is asked for the purpose," says the petition, "of ascertaining definitely whether the following material questions are involved in the appeal, and if so, whether they have been in whole or in part determined by the opinion filed or the decision rendered upon the hearing. First. Does the so-called 'mortgage of the franchise' cover the plant and other tangible property of the Oconto Water Company, now in the hands

of the receiver, and if so, to what extent? Second. Should the order granting the injunction be wholly set aside, or only modified so far as it affects the rights or interests of Andrews and Whitcomb in the franchise? Third. Should the one hundred thousand dollars of bonds ordered delivered over to the clerk of the court as void be returned to Andrews and Whitcomb? Fourth. Was the so-called 'mortgage of the franchise' a valid instrument? Fifth. If such instrument was valid, was the same so foreclosed, and the franchise covered thereby so sold, as to give to Andrews and Whitcomb the title to, and right of possession of, any property held by the receiver?"

We do not deem it necessary, or perhaps proper, to speak more definitely in respect to any of these questions. The granting or refusal of an injunction or restraining order *pendente lite* has always been a matter of judicial discretion on the part of the court or judge whose order was sought. If refused in the first instance, it might be granted at a later stage of the case, or at the final hearing, and, if granted when asked, it might afterwards be revoked or modified, and at the final hearing be denied or made perpetual; and we are of opinion that it was not intended by the recent statute, which for the first time gave a right of appeal from interlocutory orders of injunction, that a decision upon the appeal from such an order should be conclusive upon the court in the further progress or in the final determination of the case. All that should be conclusively determined by such an appeal, we think, is that the order appealed from was a proper one when made, and therefore should be affirmed, subject to the discretion of the court thereafter to modify or annul it; or that, when made, the order was an improper one, and should be reversed or modified, subject likewise to the discretion of the court, upon a new or further showing, invoking the application of different rules or principles, to reinstate the order in the original or modified form, and at the final hearing to consider or reconsider all questions in-

volved, whether of law or of fact, and give such judgment or decree as should seem right. From that judgment the aggrieved party would of course have the right to appeal and to obtain thereon a decision in all respects final. Notwithstanding the rule in respect to final judgments that, on a mandate from the Supreme Court affirming a decree, the Circuit Court must execute its decree as affirmed (*Durant v. Essex Co.*, 101 U. S. 555), it has been decided that the affirmance of an interlocutory order of injunction does not operate to deprive the Circuit Court of its inherent power to suspend the injunction, whenever the ends of justice call for the exercise of such power (*Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 59 Fed. 501, 8 C. C. A. 200); and by the same principle, we think, a decision on appeal reversing or modifying such an order should be deemed conclusive only in respect to the particular order reviewed, and that in the further progress and upon final hearing of the case in the Circuit Court the opinion and ruling on the appeal should be regarded as advisory only—more or less controlling, according to the circumstances. In this case the Circuit Court looked upon the mortgage of the appellants as a nullity. For the reason given in the opinion this court reached the opposite conclusion. But if, instead of the positive conviction declared, we had entertained grave doubt upon the point on which the question turned, it would have been our duty to rule just as we did because an injunction before final hearing should be allowed only when the right to it is clear: *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718. It is plain, therefore, that our decision did not involve, and should not be regarded as, a technical and final adjudication, for the purposes of the case, of the points which we considered in reaching our conclusion that the order of the Circuit Court was wrong, or of the questions propounded in the petition for rehearing.

The question remains, what should be the scope of the mandate? It is not necessary to consider whether or not

under the statute an appeal may be had from an order appointing a receiver. On that question see *Construction Co. v. Young*, 59 Fed. 721, 8 C. C. A. 231; *Dudley E. Jones Co. v. Munger, etc., Co.*, 2 U. S. App. 188, 1 C. C. A. 668, 50 Fed. 785; *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10; *Pennsylvania Co. v. Jacksonville, etc., Ry. Co.*, 55 Fed. 131, 5 C. C. A. 53; *American Const. Co. v. Pennsylvania Co.*, 148 U. S. 372, 13 Sup. Ct. 758. The appointment in this case was of a receiver of the property of the Oconto Water-Works Company, and of that the appellants cannot complain. The wrong done them was in ordering them to surrender to the receiver the possession of the water-works plant, of which they were in possession, claiming title under the foreclosure sale, in directing the receiver to take possession thereof, and in enjoining them against asserting title or claim to the property. These features of the order are prohibitory or mandatory in character, and subject to review upon appeal. The order whereby certain bonds were required to be delivered to the clerk involves no present harm to either party, and need not be disturbed. The mandate therefore will be that those portions of the order of the Circuit Court whereby the receiver was directed to take and the appellants to surrender possession of property, excepting the bonds aforesaid, and the appellants enjoined from asserting title, be set aside, and that the possession be restored to the appellants, unless for some cause, not apparent in the record before us, the possession of the receiver should be continued. The petition for a rehearing is overruled.

BAKER, District Judge, who participated in the original decision, concurs.

A municipality which has received power from the Legislature, to provide a supply of water for its inhabitants, or to make all contracts necessary for the welfare of the city, may grant the right to

a person or corporation to establish water-works and supply water within the bounds of the city: *Columbus Water-Works Co. v. Columbus*, 46 Kan. 466; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. Rep. 957; *Nalle v. Austin*, 85 Tex. 520, 550. And when it has by contract made a grant of the exclusive right to furnish water, it will be restrained by injunction from granting the right to lay water-pipes within its territory to a person or corporation other than the first grantee: *City Water-Works v. Atlantic City*, 39 N. J. Eq. 367. The grant of an exclusive right must not, however, be *in perpetuo*, or for an unreasonable time. See *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Altgelt v. San Antonio*, 81 Tex. 436 (twenty-five years held too long); *Long v. Duluth (Minn.)*, 51 N. W. 913 (thirty years held too long); *Greenville Water-Works Co. v. Greenville (Miss.)*, 7 So. 409; *Columbus Water Co. v. Columbus*, 48 Kan. 99 (twenty-one years held too long). But a contract for a too extensive time is not merely void, but will bind until abrogated: *Cartersville Improv. G. & W. Co. v. Cartersville*, 89 Ga. 683; *Cartersville Water-Works Co. v. Cartersville*, *Ib.* 689; *Carlyle Water L. & P. Co. v. Carlyle*, 31 Ill. App. 325; and it has been held that when such a grant is made by ordinance, and the grantee has on the faith of it gone to material expense, it will be upheld for a reasonable time: *Columbus Water Co. v. Columbus*, 48 Kan. 99.

Gifts inter vivos—Delivery—Revocation.

MARSHALL v. RUSSELL ET AL.

(Supreme Court of Tennessee, February 16, 1894.)

Deceased brought to the office of one S. a packet of notes, and handed it to S., to collect the notes, or, if necessary, to renew them in the name of deceased's wife, and to account to her, saying that he had given them to her, that they were hers. He left the office, but, before reaching the street, came back, and asked for one of the notes, saying that he wanted to see the maker about it. He took the note, and at once gave it to a young man, stating that the latter had been kind to him, and being just married, needed it. He had before spoken to others of his

gratitude to this man, and afterwards mentioned to others this gift and his reasons for making it. *Held*, that though the delivery to S. was to him as the wife's trustee, and the gift to her so far complete, it was not so specific, as to that one note, as to invalidate the revocation or correction of mistake, and the subsequent gift.

Appeal from Chancery Court, Greene county; John P. SMITH, Chancellor.

Bill by Bridget Marshall against T. D. Russell, A. N. Shoun, administrator of Patrick Marshall, deceased, and Horace Brumley, to establish her rights in a promissory note. Decree for defendant Horace Brumley. Complainant and A. N. Shoun, administrator, appealed.

H. H. Ingersoll, A. N. Shoun and J. A. Susong, for appellant.

Dana Harmon, for appellee.

MCALISTER, J.—This is an appeal from the Chancery Court of Greene county, and the contest presented in the record is in respect to the ownership of a certain note. The note in controversy was executed by T. D. Russell to Patrick Marshall, for the sum of \$1,040, for a loan of money, and was secured by a deed of trust on land. The title to this note is claimed by the defendant Horace Brumley and by A. N. Shoun, the administrator of Patrick Marshall, and also by Bridget Marshall, the widow of the intestate. The original bill was filed by Bridget Marshall against A. N. Shoun, administrator, T. D. Russell and Horace Brumley, in which she alleged that her husband, the said Patrick Marshall, departed this life on the 22d of July, 1890, and that A. N. Shoun is his administrator; that on the 5th of July, 1890, the said Patrick Marshall gave to complainant said note, and delivered the same, with others, to said Shoun for collection for her benefit or renewal in her name, as he should deem best; and that said note is her property. Complainant further alleges that after said gift was complete the said Shoun, to whom the note had been delivered for com-

plainant, allowed said Patrick Marshall, at his request, to have possession of said note for a short time ; that, while in said Patrick's possession said note was lost or mislaid, or in some other manner passed out of his possession, and was not found until after his death, when it was discovered in the possession of defendant Horace Brumley. The bill further alleges that said Brumley now claims the note as his own, and denies complainant's right thereto. A. N. Shoun, the administrator, answered the bill, admitting that the said Patrick Marshall, on the 5th of July, 1890, delivered said note, with other notes, to respondent for collection or renewal, but averred that soon thereafter he reclaimed the note in controversy, and the same was returned to him before renewal or the collection of any part thereof. Defendant avers that, if it was the intention of the said Patrick Marshall to make a gift of this note to complainant, said gift was not consummated, and the title to same remained in said Patrick Marshall, and has passed to defendant as assets to be administered. The administrator filed his answer as a cross-bill, in which he states that said note was then in the possession of Horace Brumley, who claimed the same as a gift from the intestate. He then charges that said Brumley was not related to Patrick Marshall, nor was said Marshall under any obligation, legal or moral, to make him such a benefaction. Respondent further averred that the said Patrick, at the time of the alleged gift to Brumley, was old, feeble in body, impaired in intellect, and incapable of making a valid gift of his property. The administrator denied, in the first place, that any such gift had been made to Brumley ; and, in the second place, if such a gift had been made, it was invalid, for want of mental capacity on the part of the intestate. The defendant Horace Brumley answered the bill and set up his title to the note. The answer states that on July 5, 1890, Patrick Marshall gave and delivered to defendant Brumley the note in controversy, on T. D. Russell, for \$1,040. Defendant further states that

said gift was made without solicitation on his part, and freely and voluntarily on the part of deceased. Defendant denies that said Patrick Marshall was of unsound mind at the time said gift was made, but avers that his mind was clear, and that he fully understood and comprehended the transaction. The cause went to proof and the chancellor decreed that Horace Brumley had acquired a valid title to said note by gift from the said Patrick Marshall, and accordingly the original bill of Bridget Marshall, as well as the cross-bill of A. N. Shoun, administrator, were both dismissed. From this decree the administrator and widow appealed, and have assigned errors.

The first error assigned on part of the administrator is that, at the time of the alleged gift, Patrick Marshall did not have sufficient mental capacity to comprehend the transaction. In the case of A. N. Shoun, *Adm'r v. Bridget Marshall* (decided at the present term)¹ the question was presented respecting the mental capacity of Patrick Marshall to make a gift of about \$12,000 in notes to his wife, the said Bridget, and the court held that gift to be valid. The notes involved in that suit were given to the wife on the same day the note in controversy was presented to Horace Brumley, and the same proof upon which the court adjudicated in favor of the mental capacity of the intestate is embodied in this record. The additional point, however, is made in this branch of the case that, even if it be conceded that Patrick had sufficient mental capacity to make a valid gift to his wife, yet the gift in this case was made to a stranger, who was in nowise related to him, and who had no natural claim upon his bounty, and that a higher degree of mental capacity is required to sustain a gift in the latter than the former case. If this distinction be conceded to be sound, we find, upon an examination of the record, ample evidence of mental capacity to sustain such a gift, even to a stranger.

¹ No opinion filed.

It is urged on behalf of Bridget Marshall that the decree of the chancellor is erroneous for the reason that the evidence shows that said note was given to and received by her agent, A. N. Shoun, and left in his possession for her, and that the gift was then irrevocable, and that Patrick Marshall had no right to withdraw the note from Shoun, and make another disposition of it. The settled rule is that a parol gift of a chattel or chose in action, whether it be a gift *inter vivos* or *causa mortis*, does not pass the title to the donee without delivery and transfer of the possession. The effect of a valid delivery is to place the subject of the gift under the control and dominion of the donee, and his title and right of possession by such gift and delivery, become absolute and irrevocable: *McEwen v. Troost*, 1 Sneed, 185. It is therefore essential to the validity of such a gift that the transaction be fully completed. While anything essential remains to be done, there exists a *locus poenitentiae*, and what has been done may be revoked. An absolute gift, which will divest the donor's title, requires a complete renunciation on his part, and acquisition on the part of the donee, of all the title to and interest in the subject of the gift. It is, however, settled that the delivery need not be directly to the donee, but may be made to a third party for the donee. If the delivery to the third party is simply for the purpose of delivery to the donee as agent or messenger of the donor, the gift is not completed until the subject of the gift is actually delivered to the donee. The donor can revoke the agent's authority, and resume possession of the article. When the delivery to the third person is to him in the capacity of a trustee for the donee, and not as agent of the donor, such delivery completes the gift. To constitute such a case, the circumstances should show a full relinquishment of dominion over the property to the trustee, for the purpose of the trust, so that the trustee shall not be the agent of the donor, but shall act for the donee instead: *Minchin v. Merrill*, 2 Edw. Ch. 333; *Neufville v. Thomson*,

3 Edw. Ch. 92; Dresser v. Dresser, 46 Me. 48; Scott v. Lauman, 104 Pa. St. 593.

The question, then, to be decided is, was the note in controversy delivered by Patrick Marshall to A. N. Shoun as trustee for Mrs. Bridget Marshall, the donee, and was there at the time such a full renunciation of title and relinquishment of dominion over the property to the trustee, for the purpose of the trust, as completed the delivery, and constituted a valid gift *inter vivos*? A. N. Shoun testified that about July 5, 1890, Patrick Marshall came to his office, and took from his pocket a cloth note case, and handed it to witness, saying: "'There are my notes. I have given them to my wife, and we want you to take them and collect them.' I asked him if I should pay the sum collected on the notes to him or Bridget, and he said: 'Pay them to Bridget. The notes are hers, and I want her to have what you get out of them.'"' He said for witness to collect at once, and witness then asked him what he should do if the parties could not pay the notes; and he said: "Take new notes in Bridget's name." Witness again asked him if the notes were hers, and if witness must account to her for them, and he replied in the affirmative. Witness then told him he would prepare a memorandum receipt of the notes for Mrs. Marshall to sign, and take it to her. The said Patrick Marshall then started out of the office, but soon returned, and called for a note on T. D. Russell. (Witness does not remember what he said.) He wanted to see him about the note. The Russell note was not returned to witness. Heard afterwards he had given this note to Horace Brumley. W. W. Weems, who was also present on the occasion in question, states that Patrick Marshall came into the office with a wallet in his hand, and told Mr. Shoun he wanted him to take his notes, and collect them, and pay the money over to Bridget; that if he could not collect them to renew in Bridget's name. Patrick then started

down the stairway, but before he got down he came back, and told Mr. Shoun he wanted a note from the wallet, on Thomas Russell, for \$1,000. The note was handed him, and he left the room. It appears that about \$12,000 in notes were given to Bridget Marshall, and all were decreed to her in the case of A. N. Shoun, Adm'r, v. Bridget Marshall (decided at the present term). Horace Brumley, as already seen, claims the Russell note, which is the subject-matter of the present suit. We are of opinion, upon the facts stated in this record, that, while Shoun was constituted trustee for the renewal and collection of these notes for the benefit of Bridget Marshall, yet there was not such a renunciation of the title of the Russell note, and relinquishment of dominion over it, as to amount to a completed delivery of it to the trustee. This note was not specifically mentioned in the general transfer of the batch of notes to Shoun, and the fact that Patrick Marshall, before he had retired from the building, came back to Shoun's office, and demanded the Russell note, which he carried away, would seem to indicate that he delivered it to Shoun through inadvertence, and that he never intended to include that note in the lot of notes given to his wife. It appears that on the same day he went to the store where Horace Brumley was employed, and presented him this note. He asked Brumley to read the note, and stated to him that it was secured by deed of trust executed by T. D. Russell and wife. Patrick Marshall also stated to Brumley, at the same time, that he gave it to him because he was just married, and needed it. He also stated to Brumley that he had always been kind to him, and he would rather Horace should have the note than any one. Patrick frequently spoke to others of the many acts of kindness extended him by Brumley, and often said that Horace would not lose anything by such treatment. It further appears that, after presenting the note to Brumley, Patrick mentioned the fact to others, and spoke of the

reasons that controlled him in making the gift. We are of opinion the gift is valid, and the decree of the chancellor is affirmed.

To constitute a valid gift *inter vivos* there must be a delivery of the subject thereof to the donee, or to some other person, for his use, with the intent on the part of the donor to part with all control thereof, and to vest the property in the donee. Without delivery it is not a gift, but at most a contract to give, which is invalid for want of consideration, and unenforceable even in equity: *Bretton v. Woollven*, L. R. 17 Ch. D. 416; *Campbell's Estate*, 7 Pa. 100; *Withers v. Weaver*, 10 Ib. 391; *Trough's Estate*, 75 Pa. 115; *Zimmerman v. Streeper*, 1 Ib. 147; *Scott v. Lauman*, 104 Ib. 593; *Hayden v. Hayden*, 142 Mass. 448; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Taylor v. Fire Department*, 1 Edw. Ch. 294; *Howard v. Windham Co. Sav. Bank*, 40 Vt. 597; *Cochrane v. Moore*, L. R. 25 Q. B. D. 57; *Rowland v. Phillips* (Ark.), 13 S. W. 1101; *Hamilton v. Clark*, 25 Mo. App. 428; *Board v. Callihan*, 33 W. Va. 209; *Hamer v. Sidway*, 57 Hun, 228; *Miller v. McMechen*, 33 W. Va. 197; *Matthews v. Hoagland*, 48 N. J. Eq. 455; *Backer v. Myer*, 43 Fed. Rep. 702; *Hooper v. Goodwin*, 1 Swanst. 486; *Gaskell v. Gaskell*, 2 Younge & J. 502; *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Woodruff v. Clark*, 42 N. J. L. 198; *Schick v. Grote*, 42 N. J. Eq. 352; *Snowden v. Reed*, 67 Md. 130; *Peters v. Fort Madison Const. Co.*, 72 Iowa, 405; *Flanders v. Blandy*, 45 Oh. St. 108; *Medlock v. Powell*, 96 N. C. 499. This rule applies with regard to gifts alleged as between husband and wife: *Bretton v. Woollven*, *supra*; *Wheeler v. Wheeler*, 43 Conn. 403; *Neufville v. Thomson*, 3 Edw. Ch. 92; *Woodson v. Pool*, 19 Mo. 340; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Dilts v. Stevenson*, 17 Ib. 407; *Campbell's Appeal*, 80 Pa. 298; *Paschall v. Hall*, 5 Jones Eq. 108; *Pierce v. Whaling*, 7 Biss. 426; *Wade v. Cantrell*, 1 Head, 346; *Patton v. Patton*, 75 Ill. 446.

To render a gift valid the donor must effectually part with the control of the subject itself—and this must be properly evidenced, a mere joint possession of donor and donee will not establish a gift. It is this rule that renders it so difficult to

establish, from mere circumstantial evidence, a gift as between husband and wife, for the possession of one is frequently that of the other: *Larkin v. McMellon*, 49 Pa. 34; *Holcomb v. People's Bank*, 92 Ib. 338; *White v. Zane*, 10 Mich. 333; *Allen v. Miles*, 36 Miss. 640; *Bachman v. Killinger*, 55 Pa. 414; *Pierce v. Whaling*, 7 Biss. 426; *Ex parte Cox*, L. R. 1 Ch. D. 302; *Hutchins v. Dixon*, 11 Md. 29; *Enders v. Williams*, 1 Metc. (Ky.), 346. This, of course, does not apply to mere personal effects or ornaments used by either husband or wife: *Gentry v. McReynolds*, 12 Mo. 535; *Rogers v. Fales*, 5 Pa. 154; and see Mr. David Stewart's article, *Possession by Husband and Wife*, 32 Am. Law Reg., N. S., 630, 631.

While delivery must be actual, and with intent to divest the donor of all control of the subject of the gift, and, when the subject is capable of manual tradition, should be by the means of such tradition, yet such tradition is not always necessary—or, indeed, possible—and, therefore, the rule of law is that the delivery must be in accordance with the nature of the thing to be delivered, and when it is not capable of manual tradition, or, in some cases where manual tradition would be impracticable or very inconvenient, a constructive or symbolical delivery may be sufficient to pass title: *Allen v. Cowan*, 23 N. Y. 563; *Nolen v. Harden*, 43 Ark. 307; *Bogan v. Finlay*, 19 La. Ann. 94; *Kellogg v. Adams*, 51 Wisc. 138; *Harris v. Hopkins*, 43 Mich. 272; *Tierney v. Corbett*, 2 Mackey (D. C.), 263; *Winter v. Winter*, 9 W. R. 747.

A delivery of a check constitutes a gift of the money represented thereby, although the money be not drawn until after the donor's death: *May v. Jones*, 87 Iowa, 188; *Re Saylor's Estate*, 154 Pa. 183; *Brunton v. Brunton*, L. R. 6 Eq. 275. But see as to the necessity of action on the part of the donee of the check, by way of presentment, etc., *Am. & Eng. Encyl. of Law*, vol. 8, p. 1320.

A delivery of the deposit book of a savings bank may be a good gift of the deposit evidenced thereby: *Ridden v. Thrall*, 125 N. Y. 572; *Hannan v. Sheehan*, 51 N. Y. S. R. 902; *Tillinghast v. Wheaton*, 8 R. I. 536; *Prov. Institute, etc., v. Taft*, 14 Ib. 502; *Camp's Appeal*, 36 Conn. 88; *Hill v. Stevenson*, 63 Me. 300. So the delivery and indorsement of

a certificate of deposit is a sufficient gift of the money represented by it: *Wheeler v. Glasgow* 97 Ala. 700; *Crook v. Baraboo First National Bank*, 83 Wisc. 31; *Field v. Shorb*, 99 Cal. 661. But a delivery by a depositor of a mere slip of paper containing the date and a column of figures, made by a depository, the sum of which corresponds with the aggregate of the deposits, is not enough to pass title to the deposit: *Cook v. Lum*, 55 N. J. L. 373. A delivery of certificates with words of gift may pass the equitable title to the stock represented thereby: *Conett v. Crompton*, 137 Pa. 138 (but see *contra*, *Matthews v. Hoagland*, 48 N. J. Eq. 455).

Words of present gift accompanied by leaving a person in a room with furniture, such furniture being in possession of the husband of the donee, may under certain circumstances be a good gift without manual delivery: *Kilpin v. Ralley*, L. R. [1892], 1 Q. B. 582; and see *Allen v. Cowan*, 23 Me. 502.

A mere declaration by the holder of notes that she has canceled them, and that the maker owes her nothing, does not constitute a gift: *Re Lyons Estate*, 23 N. Y. Suppl. 146; and see *Brunn v. Schuelt*, 59 Wisc. 260. Nor does the mere indorsement on a mortgage, retained by the owner, of the receipt of the amount thereof: *Morgan v. Freedom*, 68 Hun, 296. But an indorsement on a bond of payment of interest, so often as it becomes due, may, when done in the obligor's presence, and in pursuance of the declared intent of the obligee to make him a present thereof, be a sufficient gift of said interest: *Re Lewis's Estate*, 139 Pa. 640. The mere deposit in bank of money in the name of a third person, is not a valid gift to him: *Telford v. Patton*, 144 Ill. 641; *Marcy v. Amezeen*, 61 N. H. 131; *Beaver v. Beaver*, 117 N. Y. 421; *Tygard v. McComb*, 54 Mo. App. 85; *Scott v. Ford*, 140 Mass. 157; *Robinson v. Ring*, 72 Me. 144; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; but it is otherwise if the other person be informed of the deposit and assent thereto: *Alger v. N. E. Saving Bank (Mass.)*, 6 New Eng. 893; *Smith v. Ossipee Valley Ten Cent Sav. Bank*, 4 Ib. 521; *Barker v. Frye*, 75 Me. 29. A mere delivery of a certificate of stock, without actual transfer or a written assignment or power to transfer, although accompanied with words of gift, is not sufficient to make a valid gift: *Matthews v. Hoagland*, 48 N. J.

Eq. 455; but see *contra*, *Com'th v. Crompton*, 137 Pa. 138. Delivery of a mortgage, unaccompanied by the note it was given to secure, does not constitute a valid gift of the mortgage debt: *McHugh v. O'Conner*, 91 Ala. 243. Placing securities in a box or envelope indorsed with the name, or as the property of another, but making no delivery of them, does not constitute a gift: *Young v. Young*, 80 N. Y. 422; *Trimmer v. Darby*. 25 L. J. Ch. 424; *Trow v. Shannon*, 78 N. Y. 446; but, if, in addition to putting aside certificates of stock which have been taken out by the donor in the name of the donee, the donor has the stock transferred to the donee on the books of the company, the gift is complete, although the certificates are never handed to the donee: *Reed v. Roberts*, 3 W. N. C. 453; same case on appeal, 4 Ib. 353.

A delivery once made passes the title, and the mere fact that the subject of the gift comes afterwards to the hands of the donor, with the permission of the donee, will not invalidate or abrogate the gift, provided there is no intention on the part of the donee to give up his title, as where the donee hands the subject of the gift back to the donor to be kept for him, the donee, or as a loan: *Brandon v. Dawson*, 51 Mo. App. 237; *Buswell v. Fuller*, 156 Mass. 309; *Whitford v. Horn*, 18 Kan. 455; *Ector v. Welch*, 29 Ga. 443; *Danley v. Rector*, 10 Ark. 211; *Ives v. Owens*, 28 Ala. 641; *Easby v. Dye*, 14 Ib. 158.

Injunction—Equity has no jurisdiction to determine title in case of contest for office.

PEOPLE EX REL. BENTLEY ET AL. v. McCLEES, SECRETARY OF STATE, ET AL.

(Supreme Court of Colorado, December 10, 1894.)

The writ of injunction which the Constitution authorizes the Supreme Court to issue in the exercise of its original jurisdiction is a jurisdictional writ, as contradistinguished from the ordinary writ of injunction in aid of jurisdiction otherwise acquired.

To warrant the Supreme Court in taking jurisdiction in an original proceeding by injunction, the case made by the complaint must not only show equitable ground for relief, but must disclose a question involving the rights or franchises of the state in its sovereign capacity—that is, public rights or interests, as contradistinguished from matters of private or individual concern.

Where the Supreme Court was asked, in the exercise of its original jurisdiction, to issue a writ of injunction to restrain the secretary of state from delivering certificates of election to certain persons elected as district judges, the injunction being asked on the ground that the terms of the incumbents of such judicial offices were not about to expire, *held*, that the real question in controversy was the question of title to public offices between the individual claimants; that the controversy did not involve the rights or franchises of the people, or the rights of the state in its sovereign capacity, and so the writ was denied.

(Syllabus by the court.)

Original case.

The people on the relation of John A. Bentley and others made application to the Supreme Court for a writ of injunction against Nelson O. McClees, secretary of state, and others.

The complaint was as follows: "The people of the state of Colorado *ex rel.* John A. Bentley, Amos J. Rising, David B. Graham, David V. Burns and James Glynn, who bring this suit for themselves and in behalf of all others similarly situated who may wish to be made parties hereto and join herein and share the expenses hereof, complain of the defendants above named, and say: That pursuant to the provisions of an Act of the General Assembly of the state of Colorado, approved March 24, 1887, creating the office of one additional judge for the Second Judicial District, the then acting governor of the state of Colorado appointed the Honorable Platt Rogers to fill said office so created. That thereafter, and at the general election held on November 8, 1887, the Honorable Westbrook S. Decker was elected to succeed the Honorable Platt Rogers, and thereafter duly qualified and entered upon the discharge of the duties of said office. That thereafter, at a general election held November 6, 1888, the Honorable Westbrook S. Decker was again

electd district judge for the Second Judicial District of Colorado, and qualified and held said office until about December 31, 1890, when he resigned the same. That the relator, John A. Bentley, was appointed by the then acting governor of the state to fill the vacancy caused by the resignation of said Westbrook S. Decker, and duly qualified and entered upon the discharge of the duties of said office, and continued to hold and discharge the duties thereof until the general election held in November, 1891, when he was elected to succeed himself; and after such election he duly qualified by filing his oath of office with the secretary of state of the said state of Colorado, and entered upon the discharge of the duties of said office, and is still holding and discharging the duties of the same. That pursuant to an Act of the General Assembly of the state of Colorado, approved March 19, 1889, creating two more additional judges for the Second Judicial District, the then acting governor of the state appointed the Honorable Thomas B. Stuart and the Honorable Oliver B. Liddell to fill the offices so created. That thereafter, at the general election held in November, 1889, the relators, Amos J. Rising and David B. Graham, were elected to said offices to succeed the said Thomas B. Stuart and Oliver B. Liddell, and thereafter duly qualified and entered upon the discharge of the duties of said offices, and still continue to hold and discharge the duties of the same. That thereafter, pursuant to the provisions of an Act of the General Assembly of the state of Colorado passed April 6, 1891, creating the office of fifth additional judge for the Second Judicial District, the then acting governor of the state appointed the Honorable Alvin Marsh to said office. That thereafter, at the general election held in November, 1891, the relator, David V. Burns, was elected to fill said office, and in due time was duly qualified by filing his oath of office in the office of the secretary of state of said state of Colorado, and entered upon the discharge of the duties of said office, and still continues to hold and discharge the

duties of the same. That the convention which nominated said relator nominated him for the 'long term,' and so certified the said nomination to the clerk of Arapahoe county. That pursuant to the said last-mentioned Act dividing the state into judicial districts, and creating the Thirteenth Judicial District, which had not theretofore existed, the then acting governor of the state appointed the Honorable Charles L. Allen to fill said office. That at said general election, held in November, 1891, the relator, James Glynn, was elected to the office of district judge of said Thirteenth Judicial District, and duly qualified and entered upon the discharge of the duties of said office, which office he still continues to hold. That the defendant, Nelson O. McClees, was the duly-qualified and acting secretary of state of the state of Colorado. That at a convention of the Republican party held on the 8th and 10th days of September, 1894, said convention nominated, to fill the offices of judges of the District Court in the Second Judicial District, the Honorable George W. Allen, who had then held the office of district judge of said district for the full term of six years, Owen Edgar Le Fevre, Peter Levington Palmer, Frank Thomas Johnson and Calvin Pickering Butler, to succeed the relators, John A. Bentley, Amos J. Rising, David B. Graham and David V. Burns. That the County Central Committee representing said Republican county convention thereafter filed in the office of the clerk of said Arapahoe county a certificate of said nominations, which, in so far as this controversy is concerned, was in the words and figures following, to wit: 'State of Colorado, County of Arapahoe, ss: County Committee's Certificate of Nominations. To County Clerk: We certify that a convention of delegates representing the Republican party, a party which, at the last preceding election, polled at least ten per cent. of the entire vote of the county of Arapahoe, and state of Colorado, was held at the city of Denver, on the 8th and 10th days of September, 1894, for the purpose of nominating candidates for offices to

be filled at the next ensuing general election ; and that the following nominations were made therefor : Office to be filled : District judges. Candidates : George W. Allen, Owen Edgar Le Fevre, Peter Leverington Palmer, Frank Thomas Johnson, Calvin Pickering Butler. [Signed] Frank C. Goudy, presiding officer of convention ; Philip Trounstine, secretary of convention.' That at the general election held on the 6th day of November, 1894, the above-named defendants received the majority of all the votes cast by the electors in said district for said offices, and their names have been or will be certified to the secretary of state as having been elected to fill the offices held by the relators now filling the same in said judicial district. That at the same election the defendant, Edward E. Armour, received a majority of all the votes cast for said office by the electors of the Thirteenth Judicial District, and his name has been or will be certified to the secretary of state as having been elected to fill the office held by the relator, James Glynn. That the defendant, Nelson O. McClees, secretary of state, threatens to, and will, if not enjoined by an order issuing out of this honorable court, in case the canvassing board shall declare said other defendants duly elected to said offices, issue to them, and each of them, certificates of election ; and, as your relators are informed and believe, the said defendants, and each of them, will demand possession of and attempt to assume and discharge the duties of the said respective offices to which they claim to have been elected. Wherefore, these relators pray that this honorable court will assume original jurisdiction of this cause, to the end that confusion in said offices may be prevented, and that an order may issue out of this court restraining the defendant, Nelson O. McClees, from issuing certificates to the other defendants, or any of them, of election to the said respective offices, until such time as this cause can be finally heard and determined by this honorable court. They further pray that this court fix a time for the hearing of this

cause in the near future, and cause notices to be issued and served upon each of the said defendants of the time of such hearing, and that upon the hearing thereof an injunction may issue out of this honorable court perpetually enjoining the defendant, Nelson O. McClees, from issuing to the other defendants above named, or any of them, certificates of election to said offices, and also perpetually enjoining the defendants, Owen Edgar Le Fevre, Peter Leverington Palmer, Frank Thomas Johnson, Calvin Pickering Butler and Edward E. Armour, or either or any of them, from attempting in any manner to interfere with the official discharge of the duties of the several relators, and further, from attempting in any manner to discharge the duties of the offices to which they lay claim to have been elected. They also pray for such other and further relief as may be proper in the premises."

H. B. O'Reilly, Caldwell Yeaman, Willard Teller and V. D. Markham, for plaintiffs.

Eugene Engley, attorney-general, for the people.

J. H. Brown and J. H. Blood, for defendants.

ELLIOTT, J. (after stating the facts).—1. Plaintiffs seek to invoke the original jurisdiction of this court to restrain defendants Le Fevre, Palmer, Johnson, Butler and Armour from asserting any claim to certain judicial offices, which offices plaintiffs hold for the present by an undisputed title. The following provision of our state Constitution is relied on as conferring jurisdiction in the premises upon this court: "It [the Supreme Court] shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction and other original and remedial writs, with authority to hear and determine the same." Art. VI, § 3. The first question to be determined is, are the facts and circumstances stated in the complaint sufficient to warrant this court in taking original jurisdiction of this cause by writ of injunction? The express language of the Constitution

is that this court has the power to issue writs of injunction as well as the other writs specified, with authority to hear and determine the same. This language is apt and pertinent, and is sufficient to confer original jurisdiction by writ of injunction in a proper case, but it certainly was not designed to authorize this court to take original jurisdiction of ordinary suits in equity by granting writs of injunction. The connection in which the word "injunction" is used in the foregoing section of the Constitution indicates that the writ of injunction thus authorized to be issued by this court in the exercise of its original jurisdiction is an extraordinary writ—a jurisdictional writ as contradistinguished from the ordinary writ of injunction issued in aid of jurisdiction otherwise acquired; a quasi prerogative writ. The grade or dignity of the writ is indicated by the well-known character of its associates in the same section. The maxim "*Noscitur a sociis*" applies. See *Wheeler v. Irrigation Co.*, 9 Col. 248, 11 Pac. 103, and authorities there cited.

2. To warrant this court in taking jurisdiction in an original proceeding by injunction, the case made by the complaint must not only show equitable ground for relief, but must disclose a question *publici juris*; the case must be one involving the rights or franchises of the state in its sovereign capacity—that is, public rights or interests, as contradistinguished from matters of private or individual concern. This construction of the foregoing constitutional provision was given twenty years ago by the Supreme Court of Wisconsin, in an able opinion delivered by Chief Justice RYAN in the case of *Attorney-General v. Railroad Cos.*, 35 Wis. 425. That opinion was recently reviewed and emphasized by Mr. Justice CASSODAY in the case of *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35. We do not find that the doctrine has ever been departed from in that state. It is to be observed, however, that in the latter case it was held that the refusal of the attorney-general to bring the suit, or to consent thereto, would not prevent the Supreme

Court from taking jurisdiction upon the relation of a private citizen in the name of the state. Mr. Justice WINSLOW dissented from such view.

3. Counsel for plaintiffs cite and rely upon the case of *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, in which the same constitutional provision was construed. In that case the Supreme Court of Wisconsin was asked to issue a writ of injunction to restrain the secretary of state from giving or publishing notices for the election of members of the Legislature under a certain "Act to apportion the state into Senate and Assembly districts," which Act, it was contended, was unconstitutional and void. Upon motion in the nature of a demurrer to the complaint, elaborate opinions were delivered sustaining the jurisdiction of the court, holding the Apportionment Act unconstitutional, and holding, further, that the Supreme Court had the power by injunction in such original proceeding to control the action of the secretary of state. See, also, *Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944. It is not difficult to distinguish between the Wisconsin case and the one now presented. The Wisconsin case was brought to test the constitutionality of an Act under which an election of representatives was about to be held. The Act, if carried into effect, would infringe the rights of the people to representation according to the constitutional rule of apportionment. Thus their most cherished rights and franchises were threatened and the legality of the legislative department of the government itself was seriously menaced. The present case does not challenge the constitutionality of any legislative act; it does not involve the legality of the judicial department of the state, nor of any judicial district, nor of any judgeship therein. It involves simply the question, what persons will be entitled to occupy certain positions as district judges on and after the second Tuesday of January next? It is not a question of the existence or essential organization of the judiciary. The judicial posi-

tions in question exist; they must be filled by persons having the constitutional qualifications. The sole question is, what particular persons will be thus entitled to hold such offices on and after January 8, 1895? In other words, do the official terms of Judges Bentley, Rising, Graham, Burns and Glynn expire on that day, or do they continue for the period of six years from the time they were elected respectively? To determine this question, there must be a construction of certain provisions of the judiciary article of the Constitution. The validity of the legislative acts creating the additional district and additional judgeships is not questioned. The acts of a judge *de facto* of a court *de jure* are valid: *In re Manning*, 139 U. S. 504, 11 Sup. Ct. 624. In the Wisconsin case the election had not been held, nor even called; therefore, no individual claims to office had arisen. In the present case the election has been held, and it is conceded that the defendants Le Fevre, Palmer, Johnson, Butler and Armour each received a majority of the votes of their respective districts, and that the official canvass will show such result. The question, then, of the title to these respective offices, on and after January 8 proximo, is the real question in controversy. This is a question of pure legal right; in no sense can the question be regarded as one of equitable cognizance, even between the rival claimants, nor have the people of the state or of the particular judicial districts any equity in the controversy, even in the broadest sense of the term, except as all good citizens have an interest that the law shall be correctly applied. No rights or franchises of the people are assailed; each of the rival claimants, old and new, has been chosen by the people. The vital question is, for what period of time, respectively, were the present incumbents thus chosen? Their title at present is good and unassailed, but what is its duration? This question, when properly presented, must be determined as other questions of title to public offices are determined: *Neiser v. Thomas*, 99 Mo. 224, 12 S. W. 725;

Dickey v. Reed, 78 Ill. 261. The 81 Wis. and 51 N. W. case reviews a large number of cases, none of which, however, when carefully considered, militate against the view we have taken. In this connection it is proper to say that we are advised that the mandamus case referred to at page 476, 81 Wis., and page 724, 51 N. W., of the opinion, and of which it is said the court "recently assumed jurisdiction," was discontinued without an opinion.

It is strongly insisted that injunction is an appropriate remedy in this case. One line of argument is that writs of mandamus and writs of injunction are the converse or reciprocal of each other—that the former commands action, while the latter restrains—and it is assumed, inasmuch as a writ of mandamus will lie to compel an officer to perform an act which the law specially enjoins as a duty resulting from his office, that therefore the writ of injunction is always an appropriate remedy to restrain an officer from the performance of an act which the law does not enjoin as a duty resulting from his office. This reasoning is correct in many cases, but not in all. For example, a subordinate court may, under certain circumstances, be compelled by mandamus, in the nature of a writ of *procedendo ad iudicium*, to proceed to judgment; but it is difficult to conceive of a case where a writ of injunction may be employed to restrain a subordinate court from rendering judgment, even though it is made to appear that judgment should not be rendered. Writs of *certiorari* or of prohibition may sometimes be employed to regulate or restrain subordinate courts in the exercise of their jurisdiction; but, as a rule, a defeated party feeling himself aggrieved by the rendition of a judgment is left to his remedy by appeal or writ of error. So, in the present controversy, it may be that either of the several defendants would be entitled to mandamus to compel the secretary of state to issue his certificate of election, so that he may have the proper *indicia* with which to qualify, and assume the duties of his office. But it does not follow that

the secretary may be restrained from the issuance of such certificate, even though the election was unlawful; on the contrary, the secretary should not be interfered with in issuing the certificate. But such defendant, having received his certificate, should be allowed to have the title to the office determined by a proper legal proceeding: *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692; *Kemp v. Ventulett*, 58 Ga. 419; *Cochran v. McCleary*, 22 Iowa, 75.

The case of *People v. Common Council of Brooklyn*, 77 N. Y. 503, is much relied on by counsel for plaintiff. The charter of Brooklyn provided that "no alderman shall, during the term for which he is elected, hold any other public office, except that of notary public or commissioner of deeds," and declares that "if any alderman elected" under its provisions "shall be appointed or elected to and accepts such public office . . . after his election or during his term of office as such alderman, his office as alderman shall immediately become vacant and his place shall be filled by a special election to be ordered within thirty days thereafter by the common council to be held by electors of the ward in which he shall have been elected." The admitted facts were that Daniel O'Reilly was, in November, 1877, elected alderman from the Twelfth ward; that while he was such alderman, and in November, 1878, he was elected a representative in Congress for the Second Congressional District of New York; that he accepted the office on March 18, 1879, and entered upon the discharge of the duties of congressman. Upon these admitted facts a writ of mandamus was awarded commanding the common council to order a special election to fill the vacancy occasioned by O'Reilly's election and acceptance of "another public office." But the case was commenced in a court of original, not of appellate, jurisdiction, though it was afterwards affirmed by the Court of Appeals, the highest appellate tribunal of that state. The principal question discussed by the opinion in the Brooklyn case was not the propriety of

the remedy, but whether the office of representative in Congress was such "other public office" as was contemplated by the city charter. It was finally held to be such an office as caused a vacancy in the office of alderman. It will be observed, too, that the writ was mandamus, not injunction. The granting of the writ did not necessarily preclude O'Reilly from contesting the validity of the election in a proceeding to which he himself should be a party.

In argument we were urged to assume jurisdiction in order to prevent an unseemly wrangle between contesting claimants to judicial offices. But there are no averments in the complaint showing that any unseemly wrangle is likely to occur. When the time arrives, if defendants shall demand the respective offices to which they claim to have been elected, and such demand be refused, there is nothing in the complaint to indicate that they will do anything more than seek by proper legal proceedings to have their predecessors ousted and themselves inducted into office. We are confident that none of the rival claimants, either old or new, will resort to other than legal and orderly methods to secure or hold the offices in question. Though occasion may sometimes require equitable relief or protection in addition to the proper legal proceedings in controversies over public offices, yet the complaint in this case states no facts from which any kind of violence, disturbance or intrigue is to be apprehended. There is no probability that the police, the sheriff's posse, or the military will be called into requisition. The idea that such means may be resorted to, in advance of legal proceedings, to settle the title to or possession of public offices, has been pretty effectually dispelled by recent opinions of this court: *In re Fire and Excise Com'rs*, 19 Col. 482, 36 Pac. 234; *People v. Martin*, 19 Col. 565, 36 Pac. 543. In *Spelling on Extraordinary Relief* (vol. 1, § 620) it is said: "Though there is some conflict of authority as to how far equitable relief by injunction may be successfully invoked to protect one in the possession

and exercise of a public office, it is well settled by a great preponderance of authority that injunction is not a proper remedy to try the title between rival claimants as to which is entitled to fill and exercise the duties of an office, *quo warranto*, and not injunction, being the proper remedy." We are urged to entertain the present proceeding for the purpose of reaching an early decision of the controversy between the rival claimants to judicial positions, and thus prevent confusion in the administration of justice. This proceeding is commended as a "short cut" to a determination of the controversy. But short cuts in legal controversies are seldom satisfactory to the Anglo-American race. As a rule, they only submit when they have had full opportunity to fight out such controversies by proper proceedings, and to carry them, if they desire, to the court of last resort. For illustration, it would seem desirable to avoid a lawsuit to determine whether the present judge of the Thirteenth Judicial District shall continue to hold his office for three years more, or whether he shall give place to another recently chosen as his successor. But it may be that nothing short of a real lawsuit will suffice to determine such controversy. If such lawsuit shall come, it will not be the first contest over the very same office. The present incumbent holds his position by virtue of the decision of this court sustaining his election by a plurality of two votes. See *Allen v. Glynn*, 17 Col. 338, 29 Pac. 670. The controversy in that case was not an unseemly wrangle. It arose out of an honest difference of opinion as to the meaning of certain provisions of the then new Australian ballot law; and the statute was so worded that this court was divided in opinion. When judges disagree, it is not surprising that lawyers and their clients differ. The fact is, judges as well as lawyers cannot always agree when called upon to construe written constitutions and laws, or other written instruments. Judges agree more generally than lawyers, because they have no personal interests or clients to influence their judgments.

But lawsuits are often a necessity in a free government. In no doubtful case where large interests are involved will an *ex parte* opinion be accepted as decisive. This is well illustrated in respect to the very matters now sought to be brought before this court for reconsideration. See *In re Election District Judges*, 11 Colo. 373, 18 Pac. 282, where these same matters were considered and an opinion given, in response to a question from the governor. That opinion, however, was given before the calling of the election, so that no individual claims to office had arisen. It is manifest that such opinion is not now accepted as conclusive, because not delivered in an actually litigated case. We refer to this as fortifying the view that the present controversy must be heard and determined, if at all, in some proceeding where the jurisdiction of the court is undoubted. When it is heard and determined in a proceeding where the court has jurisdiction, not only to express its opinion, but to render and enforce its judgment, the decision will have more weight. The remedy provided for controversies of this kind is entirely adequate, and reasonably speedy. Even if not as speedy as could be desired, this court is not justified in exercising an unwarranted jurisdiction to escape the delays resulting from the well-settled principles of our jurisprudence. As was said by Mr. Justice GODDARD (19 Colo. and 36 Pac., *supra*): "Reasonable delay is the price we pay in order to secure the protection and vindication of personal and property rights under a government like ours." Judicial discretion is often beneficial; but the vesting of too much discretion in any public official tends to the development of arbitrary power, destructive of those certain and fixed rules of law which are the boast of our people.

We have been favored with able and instructive briefs pro and con in connection with the argument of this case; but a certain appeal in writing, made afterwards, to the effect that this court should disregard jurisdictional precedents, and undertake by this proceeding to anticipate and

decide future lawsuits, is as unwise as it must be unavailing. We should have our hands full if we were to yield to such appeals in cases that might thus be pressed upon our consideration. It would, moreover, be a sad blow to the rights and liberties of the people if courts were thus to anticipate and decide controversies not regularly before them, and which may never actually be brought to trial. Despotie governments may do this, but free constitutional governments never. If lawsuits result from the present controversy, the plaintiffs and defendants, respectively, must, as in all litigated cases under our system of jurisprudence, take and bear the responsibility of them, and abide the result. We have examined many cases that have been cited, but do not deem it necessary to discuss them, as they do not militate essentially from the view we have taken. Our conclusion is that the complaint discloses no ground for equity jurisdiction, and certainly no ground for the interposition of the extraordinary jurisdiction of this court by the issuance of a quasi prerogative writ of injunction. The application to take jurisdiction by the issuance of such writ will therefore be denied, and the complaint presented will be dismissed. Complaint dismissed.

The rule that equity will not determine the title to a public office is, in this country, well settled, and therefore one contestant for an office cannot be enjoined from exercising or making claim to it at the suit of the other: *Tappan v. Gray*, 9 Paige, 507, *aff'd* 7 Hill, 259; *People v. Draper*, 24 Barb. 265; *Demarest v. Wickham*, 63 N. Y. 320; *Sheridan v. Colvin*, 78 Ill. 237; *Patterson v. Hubbs*, 68 N. C. 119; *Jones v. Commissioners*, 77 Ib. 280; *Delahanty v. Warner*, 75 Ill. 185; *Allen v. Rhodes*, 65 Tex. 348; *Hague v. Heyberger*, 7 Watts & S. 104; *Updegraff v. Crans*, 47 Pa. 103; *Gilroy's Appeal*, 100 Ib. 5; *In re Sawyer*, 124 U. S. 200; *Prince v. Boston*, 148 Mass. 285; *Harris v. Schryock*, 82 Ill. 119; *Beebe v. Robinson*, 52 Ala. 66; *Cockran v. McCleary*, 22 Iowa, 75; *Kilpatrick v. Smith*, 77 Va. 347; *Guillotee v. Poincy*, 41 La. Ann. 333; *Reemelin v.*

Mosby, 47 Oh. St. 570; Davis v. Dawson, 90 Ga. 817; Burke v. Giland, 53 N. W. (Minn.) 716; Beach, Mod. Eq., § 679; High on Injunc., § 1312.

Jurisdiction of a contest will not be taken indirectly; as by enjoining the issue to the defendant of a certificate of election: Neiser v. Thomas, 99 Mo. 224; Moulton v. Reed, 54 Ala. 320; or the return or other action of a board of canvassers: Dickey v. Reid, 78 Ill. 261; Willeford v. State, 57 Miss. 437; or other specially authorized election tribunal: *Ex parte* Wimberly, 57 Miss. 437; and see Alderson v. Kanawha County Court Commissioners, 32 W. Va. 334 [*Re* Sloan, 25 Pac. 930, seems to infringe this rule]; or by enjoining an elected board of aldermen from issuing bonds on the ground that its members had not been legally elected: Carlisle v. Saginaw, 84 Mich. 134; or by enjoining the appointment of a successor to the plaintiff on the ground that the statute under which the appointment was to be made was unconstitutional: Reemelin v. Mosby, *supra*; or by enjoining the removal of an officer on the ground that those attempting to remove him had been elected to the positions, by virtue of which they proposed to exercise the power of removal, under an unconstitutional statute: Reeves v. Griffin; or by enjoining the payment of salary to, Burgess v. Davis, 138 Ill. 817, or the collection of, fees by, an officer *de facto*, during inquiry into his title to office: Tappan v. Gray, *supra*; Stone v. Wetmore, 42 Ga. 601; Colton v. Price, 50 Ala. 424; McAllen v. Rhodes, 65 Tex. 348; or where, in case of a tie vote, a municipal council refuses to fulfill its duty by making a choice of a person to fill an office, by enjoining the incumbent from continuing to act: Huels v. Huhn, 75 Wisc. 468.

The case of Armijo v. Bacca, 3 New Mex. 294, where the syllabus is to the effect that an injunction will be issued against one who endeavors, without claiming title, to usurp an office, will on examination be found to fall within the class of cases referred to below, in which an injunction has been used to protect an officer *de facto* in the exercise of his functions.

Kerr v. Trego, 47 Pa. 292, has sometimes been looked upon as an exceptional case. See High on Injunctions, § 1312, note. But an examination will show that all the court did was to decide as between two bodies, each claiming to be the common

council of the city of Philadelphia, that the body which showed regularity of organization was the council; but the court expressly said that it had no power to try the title to disputed seats in the body; it passed simply on the question of regularity of organization; and in speaking of this case, GREEN, J., says in *Bedford Springs Co. v. McKeen*, 16 Pa. 643: "The right to quell a disturbance in councils, made by disorderly persons, was the chief subject of contention. The subject of the validity of the election of the incoming members was not discussed or decided."

The rule above stated does not prevent a court of equity from enjoining the illegal expulsion of a member of a municipal body, where the question is not as to the legality of his election or that of the expelling body: *Armitage v. Fisher*, 4 Misc. (N. Y.) 315; or from enjoining an officer from usurping, under claim of his office, functions which do not belong to it. Thus, in *Carline v. Shallenberger*, 23 Pitts L. J. 386, a burgess was enjoined from voting or participating in the proceedings of council, he claiming the right to do so.

Where a title to an office is in dispute, the officer *de facto* may be protected by injunction, *pendente lite*, from interference in the performance of the duties of the office at the hands of the contestant, or any one else: *Guillotee v. Poincy*, *supra*; *Reemelin v. Mosby*, *supra*; *Brady v. Sweetland*, 13 Kan. 41; and it is held that an injunction may issue at the suit of a member of a board to restrain an adverse claimant from acting, until a judicial decision upon his claim has been made, when he may, otherwise than by a concurrent action with other members of the board, induct himself extrajudicially into office to some extent, and in so far oust the incumbent: *Goldman v. Gillespie*, 43 La. Ann. 83; *State v. Ninth Judicial District Judge*, *Ib.* 1172.

The rule of non-interference by equity to determine title to office, applies to officers in private corporations, the proper method of trying title to such offices being by *quo warranto*: *Nolde's Appeal*, 15 Atlan. 777; *Sherman v. Clark*, 4 Nev. 138; *Bedford Springs Co. v. McMeen*, 161 Pa. 639; *Com. v. Graham*, 64 Pa. 339.

Since the Judicature Act of 1873, the rule excluding from

equitable jurisdiction the determination of title to office does not seem to prevail in England, it having been held that under § 25, subd. 8, of that Act, providing that an injunction may be granted to protect a right which, independently thereof, may be asserted in law or in equity, a member of a school board who has been improperly declared disqualified, may obtain an injunction against the election of a new member in his place: *Richardson v. Methley School Board*, L. R. [1893] 3 Ch. 510.

Municipality—Rightful existence of—Not determinable by suit in equity by taxpayer.

TROUTMAN ET AL. *v.* McCLESKEY ET AL.

(Court of Civil Appeals of Texas, June 6, 1894.)

An injunction will not be issued at the suit of a taxpayer to restrain the officers of a municipality *de facto* from collecting taxes, on the ground that it has no legal existence as a municipal corporation.

The question of the validity of a municipal corporation which has apparently a legal existence, is determinable only by *quo warranto* proceedings.

Appeal from District Court, Wichita county.

L. Troutman and other taxpayers of the town of Iowa Park, filed a bill praying that E. A. McCleskey and others, officers of the town of Iowa Park, be enjoined from collecting taxes assessed by said town against the plaintiff, on the ground that the said town had no legal and valid existence as a municipality. The court denied the prayer of the bill and the plaintiff took this appeal.

Boyd & Ofiel, for appellants.

L. C. Barrett, for appellees.

STEPHENS, J.—This suit was brought by appellants, as taxpayers of Iowa Park, to enjoin the collection of taxes

assessed by said town against them. The validity of this tax levy was denied, on the ground that, in the incorporation of the town a large area of rural territory had been improperly included within the corporate limits. The petition for injunction alleged the pendency of a *quo warranto* proceeding to determine the validity of this incorporation, and contained the allegation of insolvency, both of the town and its officers. To the judgment dissolving, on final hearing, the preliminary injunction, from which this appeal is prosecuted, three errors are assigned. Of these, the first, only, is so assigned as to require consideration, reading: "The court erred in sustaining the motion to dissolve the injunction, because the petition showed that a *quo warranto* proceeding was pending against the incorporation of the town of Iowa Park, Texas, and that the same was insolvent, as well as its officers, who were acting under the pretended charter." It is well settled that a court of equity will not enjoin, at the instance of the taxpayer, the officers of a municipal government from the collection of taxes, on the ground of the invalidity of the existing corporation. Such an issue is determinable alone by *quo warranto* proceedings: *Brennan v. City of Weatherford*, 53 Tex. 330. Until the state, by such proceedings, puts an end to the local government, the citizen must yield obedience to its power. The mere pendency of the *quo warranto* proceedings, which the state might at any time abandon, could afford no ground for equitable relief. Besides, in the case at bar, it was alleged and proven on the part of appellees that the pending *quo warranto* proceedings must fail, on the ground that the issue had already been determined, in a former proceeding between the same parties, in favor of the corporation: *McCleskey v. State*, 4 Tex Civ. App. 322, 23 S. W. 518. We conclude that the judgment should be affirmed.

The legality of the existence of a municipal body cannot be determined in a private action, either directly or by a proceeding

to enjoin one assuming to act as an officer of said municipality or to enjoin the exercise of power under alleged municipal authority, when the ground of the application for the injunction is that the Act of Legislature or order of court constituting the municipality is unconstitutional or otherwise illegal. A usurpation of governmental powers can be inquired into and overthrown only by the sovereignty itself proceeding by *quo warranto*, or in those jurisdictions where the old writ of *quo warranto* has become obsolete, or has been abolished, by an information in the nature of a *quo warranto*: *Mullikin v. Bloomington*, 72 Ind. 274; *People v. Draper*, 15 N. Y. 532; *People v. Carpenter*, 24 Ib. 86; *State v. Carbondale Independent School District*, 29 Iowa, 264; *People v. Albertson*, 55 N. Y. 50; *People v. Clute*, 52 Ib. 576; *People v. Clark*, 70 Ib. 518; *State v. Parker*, 25 Minn. 215; *State v. Brown*, 31 N. J. L. 355; *People v. Bennett*, 29 Mich. 451; *People v. Maynard*, 15 Ib. 463; *Com. v. Fowler*, 10 Mass. 290; 11 Ib. 339; *State v. McReynolds*, 61 Mo. 203; *State v. Coffee*, 59 Ib. 59; *Dillon, Mun. Corp.*, § 894; *Rex v. Saunders*, 3 East, 119; *Lloyd v. The Queen*, 6 L. T. Rep. (N. S.) 610; *Renwick v. Hall*, 84 Ill. 162; *Territory v. Armstrong*, 6 Dak. 226; *State v. Tracy (Minn.)*, 51 N. W. 613; *Perizzo v. Kessler*, 93 Mich. 280.

The case of *State v. North*, 42 Conn. 79, does not seem to be in accord with the general line of authority.

In a *quo warranto*, based on the allegation that the body, under whose authority as a municipality one assuming to act as an officer claims to act, has no legal existence, the alleged corporation itself is not a necessary party: *Ewing v. State*, 81 Tex. 172. The English rule is that if an information be for usurping a franchise by a corporation, it should be against the corporation, but if for usurping the franchise to be a corporation, then against the particular persons guilty of the usurpation: *Rex v. Cusack*, 2 Roll. R. 113; *People v. Richardson*, 4 Cow. 109; *Scrafford v. Gladwin County*, 41 Mich. 647.

Injunction—Conspiracy in restraint of interstate commerce.

UNITED STATES *v.* ELLIOTT ET AL.

(Circuit Court, E. D. Missouri, October 24, 1894.)

[Reported 84 Federal Reporter, 27.]

A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within the Act of July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal.

The Act of July 2, 1890, § 4, which provides that the Circuit Courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings.

Under the Act of July 2, 1890, § 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force against defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them.

Bill by the United States against M. J. Elliott and others to restrain a conspiracy to obstruct and destroy interstate commerce in violation of Act July 2, 1890 (26 Stat. 209). A preliminary injunction was granted: 62 Fed. 801. Defendants demurred to the bill.

Wm. H. Clopton, U. S. attorney.

W. W. Erwin, *S. S. Gregory* and *W. A. Shumaker*, for defendants.

PHILIPS, District Judge.—This case was submitted yesterday on the demurrer filed to the bill by certain of the

defendants. The district attorney submitted the same on the pleadings, and the defendants on the pleadings and an extensive brief. This suit grew out of the recent "strike," and the bill was filed on behalf of the United States by the district attorney, under direction of the attorney-general of the United States, to enjoin the defendants from the consummation of an organized conspiracy, which threatened to obstruct and was impeding the passage of the United States mails, and interfering with interstate commerce. The demurrer, of course, admits all the material allegations of the bill—that is, all facts which are well pleaded. These averments may be summarized as follows: It is charged, in substance, that the defendants have combined and confederated together to prevent the several railroads named in the bill, being about all of the many important roads coming into the city of St. Louis, Mo., which are engaged in carrying the United States mails and in interstate commerce, carrying passengers and freights, from conducting their customary business in transporting passengers and freights between and among the different states of the Union and foreign countries. It is further charged that said defendants have combined and conspired to induce persons in the employ of said railroads to leave the service of their respective companies, and to prevent the companies from securing the services of other persons in the place of those induced to quit, the object of such conspiracy being to prevent said railroad companies from hauling cars which are extensively used in the necessary transaction of their business in interstate commerce. The bill charges the commission of divers and sundry acts by the alleged conspirators in furtherance of the objects of the confederation. Among other things, it is alleged that certain of the defendants, under the leadership of one Debs, have issued orders and directions to persons in the employ of said railroads to act subject to their direction, whereby said employes have been commanded and required to cease from operating the

respective railroads. It is further charged that certain of said defendants have threatened to tie up the entire operations of trains of such of said companies as refuse to accede to certain demands made upon them by the leaders of the conspiracy, and that it is the purpose and object of the defendants to so obstruct and cripple the business of said roads as to prevent them from performing their duties and functions as common carriers of freights and passengers among the several states through which the several lines of said roads pass. It is further alleged that it is among the objects and plans of said conspirators to control the interstate commerce between the city of St. Louis and points in other states, and thereby prevent the owners of said roads from exercising any independent control thereof in the transaction of interstate commerce. The bill further sets up, what is quite an historic fact in commercial circles, that the city of St. Louis is a large live-stock market for the sale and slaughter of cattle and hogs, and the preparation of the same for food, and is also a large manufacturing centre, from which point these food supplies and manufactured articles are distributed to various points throughout the United States, and other necessities of life, which have become essential to the commerce, growth and development of the country, and for its domestic life, and that the aforesaid interference with the transportation of these supplies is a great public detriment, not only to said city of six hundred thousand people, but to all the people of the various states reached by the exertions and efforts of this distributing point, who, by the course of business, have become largely dependent upon this source of supply. The object of the bill is to have these parties, and their aiders and abettors, enjoined and restrained from the further prosecution of their unlawful purpose and dangerous conspiracy.

The demurrer raises the question of the jurisdiction of this court over the subject-matter, and the right of the United States to bring such suit in equity; and various

other suggestions are made, of minor importance. As recited in the temporary order of injunction made by Judge THAYER, the suit was instituted upon the authority of the attorney-general of the United States, and the bill is properly sworn to in the usual form. I do not propose to go into any extended discussion of the many various questions discussed by counsel in the brief.

It is a fact of supreme importance, to be stated at the very threshold of this discussion, that the regulation and control of commerce among the states of the Union, and with foreign nations, is by the federal Constitution, reposed exclusively in the Congress of the United States. The felt necessity of this federal jurisdiction was the one great impelling cause that led to the formation of the federal Union, and the adoption of the federal Constitution. As early as 1778 this question was pressed upon the consideration of Congress by a memorial from the state of New Jersey, and in 1781, Dr. Witherspoon, one of the statesmen of that day, presented a resolution which declared that "it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial, or contrary to the common interests." And in 1786, Virginia adopted a resolution appointing commissioners to meet with like commissioners from other states, and the resolution to that effect, formulated by Mr. Madison, recited in the preamble that "Whereas, the relative situation of the United States has been found on trial to require uniformity in their commercial regulations," etc. That great jurist, Chief Justice MARSHALL, in *Brown v. Maryland*, 12 Wheat. 445, most aptly presents this matter as follows:

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view of their own interests, and our disunited efforts to counteract

their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." "What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?" "The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior." "Commerce is intercourse. One of its most ordinary ingredients is traffic."

In the passion of the hour we are apt to forget the pit from which we were dug, and the rock of permanency upon which our feet were planted by the wise and patriotic men who constructed the fabric of our government. The power to regulate commerce among the states carries with it, as the Supreme Court has repeatedly held, the power to protect and defend.

On July 2, 1890, Congress passed the law entitled "An Act to protect trade and commerce against unlawful re-

straints and monopolies," § 1 of which is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." It may be conceded that the controlling, objective point, in the mind of Congress, in enacting this statute, was to suppress what are known as "trusts" and "monopolies." But, like a great many other enactments, the statute is made so comprehensive and far-reaching in its express terms as to extend to like incidents and acts clearly within the expression and spirit of the law. It declares that every act, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the states, or with foreign nations, is forbidden. Therefore, any combination or confederation among two or more persons, in restraint of trade or commerce, comes within the express letter of the statute. The term "restraint of commerce" was used in its ordinary, business understanding and acceptance. Among the recognized meanings of the word are "prohibition of action; holding or pressing back from action; hindrance; confinement; restriction." It is a restriction or hindrance created by the application of external force. It is a *vis major* applied directly and effectually to carriers of interstate commerce, which prevents them from operation: *Olivera v. Insurance Co.*, 3 Wheat. 193. It was perfectly competent for Congress, in the exercise of its constitutional jurisdiction of the whole subject of such commerce, to pass laws to prevent and suppress unlawful conspiracies and combinations to interfere with the operation of such commerce. Accordingly, § 4 of said Act provides that:


"The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to

institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." "When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It was pursuant to this statute, *inter alia*, that Judge THAYER issued the temporary restraining order in this case. I am unable to perceive the force of the argument against the power of Congress to authorize such civil proceedings in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for Congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated.

It is urged by counsel for defendants that courts of equity will not interpose by injunction to prevent the commission of an act which, when done, would be a crime penally punishable. This is an "old saw." It is a general rule of equity jurisprudence that courts of chancery will not interpose where there is an adequate remedy at law, nor will they ordinarily interpose to prevent the commission of a crime. A well and long-established exception to this rule is that where parties threaten to commit a criminal offense, which, if executed against private property, would destroy it, and occasion irreparable injury to the owner, and especially where such destruction would occasion a multiplicity of suits to redress the wrong if committed, courts of equity may interpose by injunction to restrain the threatened injury. The law, it does seem to me, would be very imperfect, and

indeed impotent, if a number of irresponsible men could conspire and confederate together to destroy my property, to demolish or burn down my house, that I should be remitted alone to the criminal statutes for their prosecution after my property was destroyed. Most generally, such lawbreakers who engage in such conspiracies are a lot of professional agitators. They have no property to respond in damages. Their tongues are their principal stock in trade; and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing. It certainly presents a case that most strongly appeals to the strong arm of a court of equity to reach forth to prevent great injury and loss, as the only means of conserving the rights of private property. It is now a well-recognized office of a court of equity to conserve and preserve the rights of private property in advance of its molestation and appropriation, where, from the peculiar circumstances, the remedy at law might be of doubtful restitution. In the recent case in Chicago, in which E. M. Arthur was intervener, against Thomas F. Oakes *et al.* (63 Fed. 310), Mr. Justice HARLAN, in reviewing the restraining order issued by Judge JENKINS, has very effectually met this objection, and presented the law respecting unlawful conspiracies with a force and clearness to forever set this question at rest. It may not be out of place here to say that no public decision has perhaps been so much misunderstood, or ignorantly or intentionally misrepresented and perverted, as that of the distinguished jurist. The opinion recognizes the right of employes and labor organizations, in the absence of a contract binding the employé to a given term of service, whenever they become dissatisfied with their employment or their wages, to quit the service of the employer, either separately or collectively; and they have a right, by pre-agreement or preconcert of action, to unite together for taking peaceful and lawful means to secure an increase of wages; to withdraw, separately or in a body, from the serv-



ice of the employer, when dissatisfied. It is not competent for the courts to interpose to restrain their right of volition, which is among the natural and inalienable rights of every citizen, to work for whom he pleases, where he can get employment and to quit whenever he is dissatisfied therewith. But the opinion distinctly announces the further proposition that such men have no right to conspire and combine together, not only for the purpose of securing better conditions and wages, and quit service if not secured, but to go further for the purpose of preventing the employer from supplying the places vacated with other employés, who are ready and willing to take their places; that they have no right to combine and confederate together for the purpose of wantonly injuring and destroying the property of their employer, and to obstruct and interfere with his dominion over and control of his private property. An act which, if done by an individual, may be lawful, may become quite a different thing when undertaken to be done by a confederation among many having for its inspiration the purpose of injuring and destroying the property of another, by preventing him from prosecuting his business by taking into his service others to supply the places of those who voluntarily have gone out. So the learned justice says:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employés would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operations of the railroad under their management, either by disabling or rendering unfit for use the engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control or management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents, or against employés remaining in their service, or by using like methods to cause employés to quit, or prevent or deter others from entering the service in place

of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals, who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or attempt to enter the services of those against whom such combinations are aimed. And as acts of the character referred to would have defeated the proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the Circuit Court properly framed its injunction so as to restrain all such acts as have specifically been set forth, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad."

Further on, he says:

"In our consideration of this case, we have not overlooked the observation of counsel in respect to the use of special injunctions to prevent wrong which, if committed, may be otherwise reached by the court."

Then, after observing that this jurisdiction of a court of equity should be cautiously and conservatively exercised, said:

"It will be refused until the court is satisfied that the case before it is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles to administer the only remedy the law allows, to prevent the commission of the act. The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done, in order to pro-

tect rights and property against irreparable damages by wrongdoers."

Then, quoted from Mr. Justice STORY, the following :

"The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purpose of social justice, in a great variety of cases, and therefore should be fostered and upheld by a steady confidence."

The court then concludes with the statement that no other remedy than that of injunction, to meet such extraordinary conditions of affairs, was full and complete for the protection of the property, and "for the preservation of the rights of the public in its due and orderly administration by the courts." The court then says :

"That some of the acts enjoined can criminally subject the wrongdoers to actions for damages, or to criminal prosecution, does not therefore, in itself, determine the question as to interference by injunction. If the acts stop at crime, or involve merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involve the irreparable injury to and destruction of property, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate."

This doctrine was long ago announced by so distinguished a jurist as Mr. Justice STORY, who said :

"If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country."

As said by Judge THAYER in granting this provisional injunction :

"A combination whose professed object is to resist the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain

demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states; and under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means."

It would present a most anomalous state of affairs, in a country like this, if men, because of some supposed or real grievance with an employer in a distinct business, should be permitted to confederate and conspire together for the purpose of coercing the employer into acceding to their demands, and, as a means to a specific end, tie up and stop independent railroads extending from the Pacific coast to the Lakes on the north and northeast, deaden all the engines on the tracks; thereby intercepting the transportation of passengers and the necessary supplies passing from one state to another, and stop the shipment of cattle, sheep, hogs, corn, wheat, oats, fruits and vegetables. It is impossible to state in language the far-reaching destructiveness and ruin of such a scheme, if permitted to proceed to accomplishment. The business of this country has adjusted itself to operations of interstate commerce. Large communities of people are dependent for the necessities of life upon the agricultural products of other communities. While we have a state here with a productive energy and capacity for producing nearly all the necessities of life, yet, because of the fact that other localities can produce with less labor and more profit certain supplies than the local community, people forbear giving attention to the production of articles which they can thus obtain more cheaply and readily, and depend therefor upon other communities, and the railroads for transporting such supplies from one state to another. If persons may combine and confederate together to stop the railroad trains from passing from one city and one state to another, it is easy to be seen how quickly and readily they could produce ruin, famine and death in our great cities.

They could cut off such necessities for the sustenance of life as an adequate supply of coal, and in one month, or less, produce a coal famine in city and country. It certainly ought to be permissible to the government, representing the whole people, to interpose, to preserve and protect the public life and the public health. The framers of the federal Constitution builded wisely when they gave to Congress control over our interstate commerce. With prophetic eye, they looked far into the future of their country, and foresaw the development of its commerce, and the absolute necessity of the freedom of commercial intercourse between the different communities extending from ocean to ocean. The fact that Congress did not enact the statute above recited until 1890 is no argument against the existence of its power. Many powers lodged by the Constitution in the legislative department long lie dormant, until the exigency arises to invoke them into activity. As said by Mr. Justice MILLER in *Sawyer v. Hoag*, 17 Wall. 620 :

“When we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.”

Congress passed the Act of 1890 in response to the public necessities. And as the sequel proved, in the great extremity to which the country was forced last summer, the framers of the law “builded wiser than they knew.” The furious assaults made on the federal judiciary in connection with this trouble, for grasping jurisdiction, are wholly unwarranted, in view of the express authority given the courts by said Act of Congress. The federal courts are the creation of the federal Constitution, and the laws made in pursuance thereof. It is their office to execute, and not make, the laws. They possess just such powers, and all the power

and jurisdiction, as are conferred on them by the supreme law of the land. And when they come in the exercise of the jurisdiction with which they have been clothed by an express Act of the federal Legislature, and grant injunctions, as they did last summer, against unlawful combinations of men, to restrain and prevent the operations of the unreasoning and unappeasable spirit of the mob, in the protection of the freedom of trade and commerce, to break the blockades on the public highways so as to open up travel and the transportation of the United States mails, and restore by civil processes the healthful glow and flow of a nation's commerce, they come as servitors, within the meaning of the preamble to the federal Constitution, "to establish justice," and to conserve the public welfare. In such office they deserve the commendation of all good men, rather than the hurtful criticisms to which they have been exposed. It is well, in such a crisis, that the American people should be reminded that this is a government of law, and not of the tumultuous assembly controlled by one spirit to-day, and by another to-morrow.

Objection is made in the demurrer and the brief of counsel that the restraining order granted in this case went against parties not named specifically in the bill and the restraining order. The language of the provisional order in this respect is as follows :

"It is ordered that the aforesaid injunction, with writ of injunction, shall be in force and binding upon such of the defendants as are named in said bill, . . . and shall be binding upon such defendants whose names are not stated, but who are within the terms of this order."

The order further directed that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and commit some act

in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the restraining order. This, I think, it is competent for the court to do, under § 5 of the Act aforesaid, and that it was conformable to the custom and usage of courts of equity, where there are engaged such large numbers of unknown persons in such unlawful conspiracy. As the order of injunction was not to become operative upon them until served with a copy thereof, it does not lie in their mouths to question the regularity of the proceeding. My conclusion is that the bill is sufficient, and the demurrer is overruled.

The use of injunction as a prevention of unlawful acts by organized labor is of very recent origin. The first case reported is *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551 (1868), where, on a bill against officers of a trades union, charging them with giving notice to workmen that they were not to hire themselves to the plaintiff, thereby intimidating the workmen and injuring the value of the plaintiff's property, an injunction was granted on the ground that, although equity would not enjoin the commission of a crime, yet its function was to protect property, and that it would therefore stay any proceedings, whether connected with crime or not, which tended to the immediate or ultimate destruction of property or to make it less valuable or comfortable for use or occupation. In this country the first use of the injunction was directed against boycotts: *Sherry v. Perkins*, 147 Mass. 212 (1888); *Brace Bros. v. Evans* (C. P. of Allegheny Co., Pa.), 3 Ry. & Corp. L. J. 561 (1888); *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 136 (1891), and the courts here, as in England, proceeded on the ground of injury to property. In 1892, the first case was decided which looked towards the right of a court of equity to issue an injunction for the protection of public rights in case of a labor struggle. That case was *Cœur d'Alene Consolidated and Mining Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 260, which case could well have been decided on the ground of protection of

property. Following this idea came the strike injunction cases in *Toledo A. A. & N. W. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, where an injunction was issued against a railroad corporation to compel it to fulfill its duties under the Interstate Commerce Act, and it was held that the injunction extended to agents and servants of the corporation, and subsequently the chief of the Brotherhood of Locomotive Engineers was enjoined from ordering a strike and required to rescind an order calling into force a rule of the Brotherhood which produced a boycott by all of its members against the road on which the strike existed. Prior to this, an injunction had been issued in *Blindell v. Hagan*, 54 Fed. Rep. 40, against a combination for the purpose of preventing the shipping of a crew, but the court went upon the ground of preventing multiplicity of actions and refused to take jurisdiction under the Act of 1890 (26 Stat. L. 209), and did not base its action on the broad ground suggested in the *Cœur d'Alene* case. This decision was affirmed and the opinion adopted by the Circuit Court of Appeals: 6 C. C. A. 86. The case in 54 Fed. Rep. 730, better known as the Ann Arbor case, does go logically upon public grounds, although such grounds are not alluded to in the opinion, but the court stopped short, as is shown by the opinion of TAFT, J., of taking the position that railroad employes could be enjoined from quitting the company's service. In *Farmers' Loan and Trust Co. v. Northern Pacific Railroad*, 60 Fed. Rep. 803, JENKINS, J., issued an injunction based on public grounds against "the officers, agents and employes of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all persons, associations and combinations, voluntary or otherwise, whether in the service of the receivers or not," forbidding them, *inter alia*, from interfering in any way with property or management of the road, "from combining and conspiring to quit with or without notice the service of said receivers, with the object of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad," and "from ordering, recommending, approving or advising others to quit the service of the receivers on January 1, 1894, or at any other time."

In the meantime there had been certain decisions, under the provisions of the Act of 1890. In the *U. S. v. The Workmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994, it was held that an injunction would lie against the draymen of a city through whose strike the business of the city was paralyzed and the transit of goods through the state interrupted; and see *Waterhouse v. Comer*, 55 Fed. Rep. 149, supporting the same doctrine; but see, as opposing the position taken in these cases, *U. S. v. Patterson*, 55 Fed. Rep. 605. The Northern Pacific case was followed (July 2, 1894) by the *U. S. v. Debs* (Chicago Omnibus bill), in which an injunction was issued against eighteen persons by name, "and all persons combining and conspiring with them and all other persons whatsoever about the same time." THAYER, J., in the Missouri Circuit issued an injunction against nearly four hundred persons by name, "and all persons acting in concert under their direction and control." *U. S. v. Elliott*, 62 Fed. Rep. 801. The acts enjoined were similar in each case. In the same month the right of the court to issue an injunction to restrain a violation of the Act of 1890 was upheld in *U. S. v. Agler*, 62 Fed. Rep. 824; and in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, *Ib.* 803, the court held that a combination to stop mail trains as well as other trains was an unlawful conspiracy to obstruct the mails, although the obstruction was effected by merely quitting employment. After the decree of JENKINS, J., Arthur and others intervened by petition and prayed modification of the injunction; this petition was granted so far as to strike out the clause, "and from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company, on January 1, 1894, or at any other time," and denied in all other respects. The interveners then removed this case by appeal to the Circuit Court of Appeals for the Seventh Circuit: *Arthur v. Oakes*, 63 Fed. Rep. 310. That court held that a court of equity had no authority to restrain any men or number of men from quitting work whenever they saw fit, but that a conspiracy to procure an employé, or body of employés, to quit work, with the intent to thereby wrong others or prejudice the rights of the public was enjoinable. HARLAN, J., in delivering the opinion of the court, expressly said that the case was

decided on general principles of equity and without reference to the Act of 1890, upon the general subject of combinations of employes or other workmen.

In the *King v. The Journeymen Tailors of Cambridge*, 8 Mod. 11, it is said to have been held that a combination to raise wages was a conspiracy at common law. This case has been followed in England. See *King v. Edwards*, 8 Mod. 320; *Rex v. Eccles*, 3 Dougl. 337; *Rex v. Hammond*, 2 Esp. 719; *Rex v. Salter*, 5 Ib. 125; *Rex v. Bykerdike*, 1 Moo. & Rob. 179; *Rex v. Ferguson*, 2 Stark. 431; *Reg. v. Bunn*, 12 Cox C. C. 316; *Reg. v. Druitt*, 10 Ib. 592; *Rex v. Mawbray*, 6 T. R. 619; and in the United States in the earlier days: *The Boot and Shoemakers of Philadelphia* (1806) (pamphlet); *Journeymen Cordwainers of New York*, 2 Wheel. Crim. Cas. 262, Yates' Select Cas. 111; *State v. Buchanan*, 5 Har. & J. 307 (1821); *People v. Freguier*, 1 Wheel. Crim. Cas. 142 (1823); *Journeymen Tailors of Philadelphia* (pamphlet) (1827); *People v. Fisher*, 14 Wend. 1 (1835).

In *Com'th v. Carlisle*, Bright. 36, GIBSON, J., however, held that it had never been decided in England that it was unlawful for journeymen to agree that they would not work except for certain wages, or for master workmen to agree that they would not employ any journeymen except at certain rates. This position is approved in *Master Stevedores' Association v. Walsh*, 2 Daly, 1; and see *Moore & Co. v. Bricklayers' Union*, No. 1, 23 Week. Law Bull. 48; and a line of authority since *Com'th v. Carlisle* upholds the doctrine that it is not unlawful for workingmen to agree that they will not work except for certain wages: *Com. v. Hunt*, 4 Metc. 111; *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Bowen v. Matteson*, 14 Allen, 499; *Master Stevedores' Assn. v. Walsh*, *supra*; *Carew v. Rutherford*, 106 Mass. 1; *U. S. v. Kane*, 23 Fed. Rep. 748; *State v. Steward*, 59 Vt. 273; *Moore & Co. v. Bricklayers' Union*, No. 1, *supra*; and Mr. Justice STEPHENS says that no case has ever been cited of a conviction, before the year 1825, of a conspiracy in restraint of trade at common law, and regards the *Journeymen Tailors of Cambridge* case as doubtful. See 3 Steph. Hist. Crim. Law, 209. Strikes, therefore, are not necessarily illegal: *Farrer v. Close*, L. R. 4 Q. B. 602; *Arthur v. Oakes*, *supra*; but when accom-

panied by violence or by the boycott they then take the guise of an illegal conspiracy. See *Rex v. Delaval*, 3 Burr. 1434; *Clifford v. Brandon*, 2 Camp. 258; *Mogul S. S. v. McGregor*, L. R. 15 Q. B. D. 476; *People v. Wilzig*, 4 N. Y. Crim. R. 403; *People v. Kostka*, *Ib.* 429; *State v. Glidden*, 55 Conn. 46; *Baughman v. Asken*, 11 Va. Law J. 196; *Com. v. Shelton*, *Ib.* 327; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Crump v. Com.*, 84 Va. 927; *Brace Bros. v. Evans*, *supra*; *Sherry v. Perkins*, 147 Mass. 212; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135.

Upon the whole subject see the very interesting and valuable paper read by Mr. Charles Claflin Allen, of St. Louis, before the American Bar Association, at its meeting in 1894, and found in the published report of that year, entitled, "Injunction and Organized Labor."

Circular—Libel—Merits of action—Contempt of court—Injunction restraining issue of circular—Interlocutory motion.

J. & P. COATS *v.* CHADWICK.

(High Court of Justice, Chancery Division, January 25–27.)

[1893 J. 2073.]

[Reported L. R. (1894), 1 Chan. Div. 347.]

Pending an action for infringing a trade-mark, the plaintiffs are at liberty to warn the trade by circular; but to introduce discussion of the merits of the action is a contempt.

Motion.

On the 28th of December, 1893, the plaintiffs, who were manufacturers of sewing-cotton, carrying on a large and extensive trade, commenced an action against the defendants, who were also manufacturers of sewing-cotton in a large way of business, for an injunction to restrain them from infringing the plaintiffs' registered trade-mark, No. 4618, and

for an injunction to restrain them from representing by means of wrappers, labels, tickets or otherwise that the goods made and sold or offered for sale by the defendants were the goods of the plaintiffs, and for damages or an account.

On the same day that the plaintiffs issued their writ, they sent out to the retail dealers in the sewing-cotton trade, and to others, a circular, of which the following is a copy :

“DEAR SIR:—We regret to have to draw your attention to the fact that Messrs. James Chadwick & Brother (Limited) have recently attempted to injure our trade by adopting a blue label for four hundred yards six-cord which so closely resembles ours as to produce the result of their goods being passed off as ours, nor can there be any doubt that this is intended, as Messrs. Chadwick have previously and for a number of years sold their four hundred yards six-cord with a label of their own which in no way resembles ours.

“Being apparently unsuccessful in selling this class of goods with their own label, they have now adopted the device of imitating ours in order more readily to find purchasers for their thread.

“We are determined to use every means in our power to put a stop to unfair competition of this sort, and have therefore commenced proceedings against Messrs. Chadwick. We have also been compelled to take proceedings against retail dealers selling goods manufactured by Messrs. Chadwick and bearing the blue label which is an imitation of ours.

“We think it right to warn the trade in general of the course we are pursuing, and, for your information, we beg to give you at foot an extract from a recent judgment given in the Chancery Division of the High Court of Justice.

“Yours truly,

“J. & P. COATS (Ltd.).

“(Extract from Judgment.)

“‘All I can say, in conclusion, as to these labels, is this, that, though the defendant may, if he pleases, use such labels or wrappers as are to his liking, he must take very good care that in doing it he does not adopt any which may have the effect or be calculated to produce the result of passing off his goods as those of the plaintiff.’”

The defendants now moved for an injunction to restrain the plaintiffs from issuing the above circular, and from issuing any other circular intended or calculated to prejudice or impede the fair trial of the action, or in the alternative that a writ of sequestration might be issued against the property of the plaintiff for contempt of court in issuing the circular.

Sir R. Webster, Q. C., Bousfield, Q. C., John Cutler and Sebastian, in support of the motion.

Sir E. Clarke, Q. C., Moulton, Q. C., Bramwell Davis and Reginald Winslow, for the plaintiffs.

The following cases were referred to: *In re Cheltenham and Swansea Railway Carriage and Wagon Company*, Law Rep. 8 Eq. 580; *Roach v. Hall*, 2 Atk. 469; *Kitcat v. Sharp*, 31 W. R. 227; *Goulard v. Lindsay*, 4 Rep. Pat. Cas. 189.

CHITTY, J.—The defendants' motion is founded on an alleged contempt. It asks for an injunction to restrain the plaintiffs from issuing the circular of the 28th of December, 1893, and from issuing any other circular intended or calculated to prejudice or impede the fair trial of the action, or in the alternative for a sequestration against the plaintiffs. It is competent for the court, where a contempt is threatened or has been committed, to take the more lenient course of granting an injunction in preference to making an order for committal or sequestration: *Plimpton v. Spiller*, 4 Ch.

D. 286. The circular complained of is dated the same day as the writ in the action, and is signed by the plaintiffs. It runs thus. [His Lordship read the circular, and proceeded:]

This circular has been widely distributed by the plaintiffs among retail dealers in the sewing-cotton trade and others. The special ground of complaint is that the class of persons to whom the circular is addressed is the very class to whom the defendants will have to look for evidence in support of their defense, and that it is calculated to create a bias against the defendants in the minds of those who receive it, and to deter them from coming forward as witnesses for the defendants. It appears to me that it is calculated to prejudice the defendants in their defense, and that it thus falls under the well-established head of contempt by interfering with the course of justice. It is a strong, one-sided statement by one of the parties to the action on the merits of the case which is pending before the court. It unhesitatingly imputes fraud and dishonesty to the defendants. It charges them not merely with imitating the plaintiffs' goods, but with the deliberate intention of imitating. The fact that Messrs. Coats hold a high position in the trade, being, as their counsel stated, at the very head of the trade, gives additional force to these statements, and renders it the more probable that the traders, and particularly the smaller retail traders, will be thereby affected adversely to the defendants. The plaintiffs' counsel not only admitted, but boldly asserted, and made it part of their argument, that the circular was libellous, and that they could justify the libel, and they referred to some of the evidence which apparently had been adduced for the purpose of sustaining the justification. But the evidence and the argument founded on it are irrelevant on this motion. Interference with the course of justice by the publication of *ex parte* statements by a party to an action is not the less a contempt of court because the statements are libellous, or because the party is prepared to

justify the libel, or because the libel deals with the merits of the action. The considerations applicable to the granting or refusing an injunction on interlocutory motion in a libel action have no application in the present case. On such a motion as the present, the court declines to go into the merits of the action. The circumstance that the moving parties press for the less severe remedy by injunction rather than the more stringent remedy by committal or sequestration makes no difference.

I grant the injunction as asked, with costs, adding that I should not have intervened if the circular had amounted to a mere warning to the trade against infringement or imitation. The plaintiffs are at liberty to warn the trade as much as they like, notwithstanding the pendency of this action, but they are bound to refrain during its pendency from public discussion on the merits or demerits of the case.

Contempt by publication, traceable to parties to cause, does not seem to be a very common offense. In the following recent instances, publications bearing upon or having reference to the subject-matter of proceedings pending before a court have been held contempt, when made or brought about by a party thereto, viz.: where a defendant caused to be published in a newspaper of general circulation at the place where the court was in session, that certain persons had made a wager that owing to the influence of adverse claimants the court would reverse its decision in a pending action: *Territory v. Murray* (Mont.), 15 Pac. 145; where a co-respondent in divorce inserted in the local newspapers an advertisement denying the allegation in the petition and offering a reward for information concerning them: *Brodrigg v. Brodrigg*, 56 L. J. N. S. 672.

Application of payments.**PEARCE v. WALKER.**

(Supreme Court of Alabama, May 15, 1894.)

If one indebted to another on several accounts fail to direct the application of a partial payment at the time it is made, the creditor may apply it on any account.

In a suit to enjoin the enforcement of a power of sale in a mortgage on the ground that the debt had been paid, it appeared that the mortgagor was indebted to B. on a mortgage, and also to a firm of which B. was a member. A payment was made by a third person, with whom money had been deposited by the mortgagor, to another member, and the depositary made a memorandum at time of the deposit indicating that the money was to be applied on the mortgage, but neither such member nor the mortgagee had knowledge of it. The uncontradicted testimony of this other member was that he received the money under an agreement with the mortgagor that it was to be applied on the debt due the firm. The payment was not entered in the mortgagor's account with the firm until twelve months later, though written evidence of it was given. *Held*, the creditor was not bound to apply the payment in satisfaction of the mortgage.

A creditor's right of application of a payment to either of several debts is not limited in time, but, having once made it, he cannot change it without the consent of the debtor.

A debtor cannot, after having made a payment, direct its application to any special debt.

The burden of proving payment is upon the party pleading it.

The burden of proving that a direction as to the application of a payment was made known to the creditor is on the debtor.

Appeal from Chancery Court, Marion county; THOMAS COBBS, Chancellor.

Bill of Thad. W. Walker against James P. Pearce. There was a decree of complainant. Defendant appealed.

Almon & Bullock, for appellant.

McGuire & Collier, for appellee.

BRICKELL, C. J.—The bill was filed by the appellee for

the cancellation of a mortgage on lands he had executed to the appellant, and to enjoin the appellant from proceeding to the execution of a power of sale contained in the mortgage. The relief was sought upon two grounds, the first of which was that the mortgage had been extinguished by a second mortgage taken in satisfaction, and the second, the payment of the mortgage debt. The chancellor did not sustain the first contention, and in that respect the decree is not now open to revision. The contention of payment was sustained, and a cancellation of the mortgage decreed, from which decree this appeal is taken.

A party pleading payment, whether as matter of defense or as ground of affirmative relief, must prove it, if the fact is denied. If of it no evidence is offered, or if the evidence of it be equally balanced, or if the evidence does not generate a rational belief of the fact, the party affirming its existence must fail for want of proof: 3 Brick. Dig., p. 698, §§ 1, 2. It is not the fact of payment which is now the matter of dispute. That there was a payment of a sum which, taken in connection with other payments, was more than sufficient to satisfy the mortgage debt, is admitted. The controversy is whether a particular payment shall be applied to the mortgage debt, or to another debt owing by the mortgagor to a partnership of which the mortgagee was a member. The general rule is that when a party indebted to the same person on more than one account makes a partial payment, he has the unqualified right to direct its application to one debt in preference to the other. The payment is voluntary, and the debtor may declare the terms upon which it is made, and the creditor must accept them or reject the payment. If he accepts the payment, he takes *cum onere*. Therefore, it is that if the debtor pay with one intent, which is known or communicated to the creditor, and the creditor receives with another intent, the intent of the payer must prevail: Mayor, etc., v. Patten, 1 Am. Lead. Cas. 339. But if the debtor does not, at or before the

time of the payment, give direction to its application, his control of the payment is gone, and the right of the creditor to appropriate it arises, and he has the unqualified right to apply it to any valid, subsisting debt he may hold against the debtor: *Ib.* 341. An exception to this rule obtains when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund. Then, without the consent of the debtor, the creditor cannot apply it otherwise than to the exoneration of the source or fund from which it was derived. Nor can the debtor, without the consent of the creditor, divert the payment from relief of that source or fund: *Ib.* 341; *Strickland v. Hardie*, 82 Ala. 412, 3 South. 40.

We have with much care examined the evidence, and we cannot concur in the conclusion of the chancellor that, at or before the time of the payment, the mortgagor directed its application to the payment of the mortgage debt. The fact of such direction is like the fact of payment—an affirmative fact lying particularly within the knowledge of the debtor; and, if it be denied, the burden of proving rests upon him. The direction need not be given in express words; circumstances may indicate it as fully as express words. If it is insisted that the direction was given in words, these must be communicated to the creditor; and, if circumstances are relied upon as indicating it, knowledge of these circumstances must be traced to the creditor. There is an entire want of evidence that the intent of the mortgagor to apply the payment to the mortgage debt, if such intent existed, was made known to the mortgagee before or at the time of payment. The payment was not made to the mortgagee, but to a partnership of which he was a member, having a valid debt against the mortgagor; and of it the mortgagee had not knowledge or notice until it was claimed by the partnership as a payment on the debt due it. The payment was not made by the mortgagor, but by a third person with whom a brother of the mortgagor

had deposited money. The memoranda made by this depositary do indicate that the money was deposited with him to be applied to the payment of the mortgage debt; but of these memoranda and of the facts they indicate the mortgagee had not information prior to or at the time of the payment; nor is it shown that the partner to whom the money was paid had notice or information of the memoranda or of the fact they indicate. On the contrary, the partner receiving the money testified that he applied for and received it because of an agreement with the mortgagor that he should receive and apply it to the debt due the partnership; and in this respect his evidence is uncontroverted. Some stress seems to be laid by the chancellor on the fact that the payment was not entered on the account of the mortgagor with the partnership until more than twelve months after it was made. If this case were to be determined wholly upon the right of a creditor to apply a payment, the fact would be of little, if any, significance. The general principle is that a creditor's right of application is not limited in point of time. He may take it any time he elects; but, having once made it, he cannot change it without the consent of the debtor. The fact, however, is not now of any significance, because there was, at the time of the payment, written evidence of it given, which was accessible to the debtor, and of which, as evidence, he could have availed himself at any time. There may or may not have been in the mind of the mortgagor an intent, when the payment was made, that it should be applied to the mortgage debt. Such intent was not communicated to the mortgagee, and the payment was unattended by any act or declaration manifesting it; and, if there was nothing else in the case, it would be enough to say that, before the creditor can be affected by the intent of the debtor in making a payment, the intent must be disclosed to him: *Brice v. Hamilton*, 12 S. C. 32; *Long v. Miller*, 93 N. C. 233. The subsequent declarations of the mortgagor that he

intended the payment to be applied to the mortgage debt are not of any consequence. The payment was an act completed. Before or at the time of making it he could have given direction to it; after it was made he was without control over it, nor could his past conduct be qualified or explained by his subsequent declarations. The partner receiving the payment did not act or profess to act as the agent of the mortgagee, nor was he dealt with in that capacity. If he had been dealt with in that capacity the evidence does not disclose authority to receive payment of the mortgage debt: *Smith v. Kidd*, 23 Am. Rep. 157. The decree must be reversed and the cause remanded for further proceedings in conformity to this opinion. Reversed and remanded.

Where more than one debt exists between two parties the debtor has a right to direct his payment to be applied to any of the debts which he chooses: *Cremer v. Higginson*, 1 Mason, 338; *Franklin Bank v. Hooper*, 36 Me. 222; *Smuller v. Union Canal Co.*, 37 Pa. 68; *Mayor v. Patten*, 4 Cranch, 317; *Tayloe v. Sandiford*, 7 Wheat. 13; *Sherwood v. Haight*, 26 Conn. 432; *Pickering v. Day*, 2 Del. Ch. 333; *Semmes v. Boykin*, 27 Ga. 47; *Coleman v. Slade*, 75 Ib. 61; *Hatcher v. Conner*, Ib. 728; *Jackson v. Bailey*, 12 Ill. 159; *Forelander v. Hicks*, 6 Ind. 448; *Trentman v. Fletcher*, 100 Ib. 105; *Ross v. Crane*, 74 Iowa, 375; *Irwin v. Paulet*, 1 Kan. 418; *Nuttall v. Brannin*, 5 Bush, 11; *McDaniel v. Barnes*, Ib. 183; *Bloodworth v. Jacobs*, 2 La. Ann. 24; *Robson v. McKoin*, 18 Ib. 544; *Mitchell v. Dall*, 4 Gill & J. 461; *Dickey v. Permanent Land Co.*, 63 Md. 170; *Gilchrist v. Ward*, 4 Mass. 463; *Hussey v. Manufacturers' Bank*, 10 Pick. 415; *Reed v. Boardman*, 20 Pick. 441; *Solomon v. Dreschler*, 4 Minn. 278; *Brady v. Hill*, 1 Mo. 317; *Gartner v. Kemfer*, 58 Ib. 570; *Bean v. Brown*, 54 N. H. 395; *Martin v. Draher*, 5 Watts, 544; *Black v. Shooler*, 2 McCord, 293; *Bell v. Bell*, 20 So. Car. 34; *Willis v. McIntyre*, 70 Tex. 34; *Lapham v. Kelley*, 35 Vt. 195; *Jones v. Williams*, 39 Wisc. 300; *Champenois v. Fort*, 45 Ib. 356; *Fargo First Nat. Bank v. Roberts* (N. D.), 49 N. W. 722; *King v. An-*

draws, 30 Ind. 429; *Trullinger v. Koford*, 7 Oreg. 228; *Beatty v. Bordwell*, 91 Pa. 458; *Nichols v. Knowles*, 3 McCrary, 477; 2 Parsons on Contracts, 629; 18 Am. & Eng. Encyl. of Law, 236; Benjamin on Sales, § 746. This right of the debtor is absolute in all cases of voluntary payment, and cannot be affected by a declaration on the part of the creditor that he will not accept the payment as offered; if he take it at all, he takes it with the qualification annexed by the debtor: *Peters v. Anderson*, 5 Taunt. 596; *Simpson v. Ingham*, 2 B. & C. 65; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Crofts v. Lumley*, 5 E. & B. 648; 6 H. L. Cas. 672; *Waller v. Lacy*, 1 Man. & G. 54; *Jones v. Gretton*, 8 Exch. 773; *Reed v. Boardman*, *supra*; *Levystein v. Whitman*, 59 Ala. 345; *Smuller v. Union Canal Co.*, *supra*; *Godfrey v. Warner*, Hill & Denio, Suppl. 32; *Eylar v. Reed*, 60 Tex. 387; *Runyon v. Latham*, 5 Ired. L. 551; *Stewart v. Hopkins*, 30 Ohio St. 502; *Randall v. Parramore*, 1 Fla. 410; *Jackson v. Bayley*, 12 Ill. 161; *Hussey v. Manufacturers' Bank*, *supra*; *Caldwell v. Wentworth*, 14 N. H. 431; *Long v. Miller*, 93 N. Car. 233; *Martin v. Draher*, 5 Watts, 544; *Boutwell v. Mason*, 12 Vt. 608; *Black v. Shooler*, *supra*; *McDonald v. Pickett*, 2 Bailey (So. Car.) 617. The application cannot be changed by a court of equity: *Selfridge v. Northampton Bank*, 8 W. & S. 320.

The debtor must make application at the time of payment: *Nat. Bank v. Bigler*, 83 N. Y. 51; *Aderholt v. Embry*, 78 Ala. 185; *Frost v. Weatherbee*, 23 So. Car. 354; *Frazer v. Miller*, 7 Wash. 521; *McCurdy v. Middleton*, 82 Ala. 233; *Reynolds v. McFarlane*, 1 Overt. 488 (*cf. Wittkowsky v. Reed*, 82 N. Car. 116). But a declaration in advance of payment, if not changed at or before the time of payment, is a sufficient manifestation of appropriation: *Fargo First Nat. Bank v. Roberts*, *supra*.

The debtor's election may be shown otherwise than by express words: *Tayloe v. Sandiford*, 7 Wheat. 14; *West Branch Bank v. Moorehead*, 5 W. & S. 542; *Scott v. Fisher*, 4 T. B. Mon. 387; *Stone v. Seymour*, 15 Wend. 19; *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346; *Terhune v. Colton*, 12 N. J. Eq. 233; *Fridley v. Bowen*, 103 Ill. 633; *Adams Exp. Co. v. Black*, 62 Ind. 128; *Cameron v. Kerr*, 3 Ont. App. 30; *St. John v. Rykert*, 26 Grant, 249, 4 Ont. App. 213; *Buchanan v. Kirby*, 5 Grant, 332; *In re Brown*, 2 Ib. 111, 590; *Penn. Coal Co. v.*

Blake, 85 N. Y. 226; Shaw v. Picton, 4 B. & C. 715; Newmarch v. Clay, 14 East. 239. The payment of the exact amount of one of several debts will show an appropriation to that debt: Marryatt v. White, 2 Stark. 101; Shaw v. Picton, *supra*; Newmarch v. Clay, *supra*; Plumer v. Long, 1 Stark. 153; Kirby v. Duke of Marlborough, 2 M. & S. 18; Williams v. Rawlinson, 3 Bing. 71; Robert v. Garnie, 3 Caines, 14; Seymour v. Van Slyck, 8 Wend. 403; Davis v. Fargo, Clark Ch. 470. So the entry of a payment in the debtor's own book *if shown to the creditor*: Frazer v. Bunn, 8 C. & P. 704; so the declaration of the bearer of the money at the time of its delivery: Gay v. Gay, 5 Allen, 157; Hansen v. Rounsand, 74 Ill. 238. But the mere intention to appropriate, uncommunicated to the creditor, will not bind the creditor as an appropriation: Simpson v. Ingham, 2 B. & C. 65; Long v. Miller, 93 N. Car. 233; Brice v. Hamilton, 12 So. Car. 32; Moore v. Norman (Minn.), 18 L. R. A. 369; Hill v. Robbins, 22 Mich. 475. In some cases, however, the debtor's intention seems to be assumed, as where the debts are due, one by the debtor on his own account, and the other in a representative capacity, there the application will be to the individual debt: Goddard v. Cox, 2 Stra. 1194; Fowke v. Bowie, 4 Har. & J. 566; Sawyer v. Tappan, 14 N. H. 352; and where funds arise from a security given to secure a particular debt they should be applied to it: Sanders v. Knox, 57 Ala. 80; Jones v. Benedict, 83 N. Y. 79; Brighton v. Doyle, 64 Vt. 616; Sumner v. Kelly, 38 So. Car. 507.

If the debtor do not make the appropriation, then the right of appropriation rests with the creditor: Blackman v. Leonard, 15 La. Ann. 59; Hagerman v. Smith, Tayl. (U. C.) 123; Coxwell v. De Vaughn, 55 Ga. 643; Wilhelm v. Schmidt, 84 Ill. 183; Lewis v. Pease, 85 Ib. 31; Davis Sewing-Machine Co. v. Buckles, 89 Ib. 237; Shepsey v. Bowen Bank, 59 N. Y. 485; Harding v. Tift, 75 Ib. 461; Nat. Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437; Johnson v. Thomas, 77 Ala. 367; Bell v. Radcliff, 32 Ark. 645; Blinn v. Chester, 5 Day, 166; Pickering v. Day, 4 Houst. 474; Blackstone Bank v. Hill, 10 Pick. 129; Crisler v. McCoy, 33 Miss. 445; Waterman v. Younger, 49 Mo. 413; Sawyer v. Tappan, 14 N. H. 352; Bird v. Davis, 14 N. J. Eq. 467; Logan v. Mason, 6 W. & S. 9; Watt v. Koch, 25 Pa.

411; *Smith v. Screven*, 1 McCord, 368; *Ayres v. Hawkins*, 19 Vt. 26; *Howard v. McCall*, 21 Gratt. 205; *Hall v. Wood*, 14 East, 243; *Giles v. Vandiver*, 91 Ga. 192. This right of the creditor springs from the neglect or refusal of the debtor to make application, and does not exist where the latter has had no opportunity of making it: *Waller v. Lacy*, 1 Man. & G. 54; 2 Parsons on Cont. 631; or where it will work direct injustice to a third party, as where the money paid is furnished to the debtor by a third person, whose property would be liable were it not applied on his indebtedness: *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683. This applies where there are two debts owing by the debtor, the one as an individual, the other as a partner, and the payment to be made with firm money: *Thompson v. Brown*, Mood. & Mal. 46.

The creditor need not make an immediate appropriation: *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Howard v. McCall*, 21 Gratt. 205; *Plummer v. Erskine*, 58 Me. 59. There are cases holding that it must be made within a reasonable time: *Allen v. Culver*, 3 Den. 284; *Pattison v. Hull*, 9 Cow. 749; *Hawkes v. Conrad*, 12 S. & R. 301; *Briggs v. Williams*, 2 Vt. 283. It is held by some authorities that it must be made before action brought: *Moss v. Adams*, 4 Ired. Eq. 42; *Callahan v. Boazman*, 21 Ala. 246; *Richards v. Columbia*, 55 N. H. 96; *Whetmore v. Murdock*, 3 Woodb. & M. 390; *Simpson v. Ingham*, *supra*; by others that it may be made at any time before trial or even at the trial: *Bosanquet v. Wray*, 6 Taunt. 597; *Philpot v. Jones*, 2 Ad. & Ell. 41; *Johnson v. Thomas*, 77 Ala. 367; *Hayne v. Waite*, 17 Cal. 446; *Larrabee v. Lumbert*, 32 Me. 97; or even at any time before judgment or verdict: *Brice v. Hamilton*, 12 S. Car. 32. A creditor may change the application at any time prior to his communication of it to the debtor: *Simpson v. Ingham*, *supra*; *Seymour v. Marvin*, 11 Barb. 80; *Dorsey v. Wayman*, 6 Gill, 59; but when the appropriation has been communicated to the debtor the right to change is gone: *Hooper v. Ray*, 1 Q. B. Div. 178; except by consent of both parties: *Bundlett v. Small*, 25 Me. 29, and it cannot be changed even by such consent when the rights of third parties would be affected by the change: *Thayer v. Denton*, 4 Mich. 192; *Smith v. Wood*, 1 N. J. Eq. 192; *Chancellor v. Schott*, 23 Pa. 68; *Richmond Iron*

Works v. Woodruff, 88 Gray, 447. The creditor cannot make his election after the rights of third parties have intervened so as to affect their rights: *Harrison v. Johnson*, 27 Ala. 445; *Pattison v. Hull*, 9 Cow. 747; *Berghaus v. Allen*, 9 Watts, 386. In making his appropriations, the creditor may very largely consult his own advantage, he may appropriate to a later rather than an earlier charge: *Henry Bill Pub. Co. v. Utley* (Mass.), 29 N. E. 635; to the debt of an individual rather than that of a firm of which he is a member, if there be no proof that the payment is made with firm money: *Tootle v. Jenkins*, 82 Tex. 29; *Senter v. Williams* (Ark.), 17 S. W. 1029; to the debt of one firm of which the debtor is a member rather than that of another of which he is also a member: *Armitage v. Saunders*, 94 Mich. 482; *Hull v. Johnston*, 6 Tex. Civ. App. 110; to a bill for goods or to an open account rather than to a note: *Watson v. Johnson*, M. L. Rep. 7 Q. B. 147; *Chaffe v. McKenzie*, 43 La. Ann. 1062; to an unsecured rather than a secured claim: *Fair Haven First Nat. Bank v. Johnson*, 26 Atl. 634; *Institution v. Brush*, 29 N. J. Eq. 119; *Harding v. Tift*, 75 N. Y. 461; *Kirby v. Marlborough*, 2 M. & S. 18. He may apply the payment to a debt whose collection he could not enforce at law, as a debt barred by the statute of limitations: *Mills v. Fowkes*, 5 Bing. N. C. 455; *Williams v. Griffith*, 5 M. & W. 542; *Cathcart v. Haggart*, 37 U. C. Q. B. 47; *Brown v. Burns*, 67 Me. 535; *Sanborn v. Cole*, 63 Vt. 590; *Armisted v. Brooke*, 18 Ark. 521; it may be applied to take a claim out of the statute: *Williams v. Griffith*, *supra*; but see *contra Ramsey v. Warner*, 97 Mass. 8, where it is held that while a payment may be well applied to a debt barred by the statute yet that payment will not remove the bar as to the remainder of the debt; but it is said it cannot be split up so as to take several claims out of the statute: *Ayer v. Hawkins*, 19 Vt. 26; but see *Jackson v. Burke*, 1 Dill. 311. It may be applied to a debt whose recovery would be prevented by the statute of frauds: *Haynes v. Nice*, 100 Mass. 327; or even one the consideration of which was illegal, as a tippling bill: *Dawson v. Remnant*, 6 Esp. 24; *Laycock v. Pickles*, 4 B. & S. 507; *Philpot v. Jones*, 2 Ad. & E. 41; *Cruickshanks v. Rose*, 1 M. & Rob. 100; or a bill of exchange void for want of a stamp: *Biggs v. Dwight*, 5 Man. & Ry. 308; but if the contract be one which the law prohibits,

and not one which it merely declines to enforce, there can be no appropriation to it when the creditor has a legal demand against the same debtor: *Phillip v. Moses*, 65 Me. 70; *Starkey v. Gabby*, 1 Cr. & Dix, 248; *Wooley v. Alexander*, 99 Ill. 188; *Brown v. Lacy*, 83 Ind. 436; *Rohan v. Hanson*, 11 Cush. 44; *McCausland v. Ralston*, 12 Nev. 195; *Greene v. Tyler*, 39 Pa. 361; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Turner v. Turner*, 80 Va. 379; *North Bend First. Nat. Bank v. Miltonberger* (Neb.), 51 N. W. 232; *Humphrey v. McCauley*, 55 Ark. 143; *Danforth v. National State Bank*, 3 U. S. App. 7.

A creditor is not at liberty to appropriate a payment to a subsequent equitable claim in preference to a prior legal debt: *Godard v. Hodges*, 1 Cr. & M. 33. Whether he may prefer the equitable claim, if prior to the debt, is perhaps uncertain: 2 Pars. Contracts, 631; *Bosanquet v. Wray*, 6 Taunt. 497; *Birch v. Tibbitt*, 2 Stark. 74.

A creditor may not, in the case of a running account, split it up and elect to apply a payment to certain items therein, but the payment must be applied to the earliest items, the account being regarded, for this purpose, as a whole: *Clayton's Case*, 1 Meriv. 572; *Brown v. Adams*, L. R. 4 Ch. App. 764; *Thompson v. Hudson*, L. R. 6 Ch. App. 320; *Bodenham v. Purchas*, 2 B. & A. 39; *Hooper v. Keay*, 1 Q. B. D. 178; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Trs. of Germ. Luth. Ch. v. Heise*, 44 Md. 454; *Jackson v. Johnson*, 74 N. Y. 607; *Chester Tube Co. v. Whittington*, 94 Pa. 139; *Souder v. Schechterly*, 91 Ib. 83; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Harrison v. Johnston*, 27 Ala. 445; *Wendle v. Ross*, 33 Cal. 650; *Sanford v. Clark*, 29 Conn. 457; *Howe v. Planters' Bank*, 32 Ga. 1; *McKenzie v. Morris*, 22 Me. 138; *Hersey v. Bennett*, 28 Minn. 86; *Weller v. McIntyre*, 70 Tex. 34; *Shedd v. Wilson*, 27 Vt. 478; *Major v. Tarbell*, 28 Vt. 498; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Dunington v. Kirk*, 57 Ark. 595; *Kehl v. Smith*, 87 Wisc. 212; unless there are circumstances which show that the parties to the account did not intend the transaction to come under the general rules. See *Henniken v. Wigg*, L. R. 4 Q. B. 792; *Stoneld v. Eade*, 4 Bing. 154; *City Discount Co. v. McLean*, L. R. 2 C. P. 692; *Co. of Frontenac v. Breden*, 17 Grant, 645; *Tulley v. De Forrest*, 19 Conn. 190; *In re Hallett's Trusts*, 13 Ch. D.

696; but the fact that the account contains items for goods sold on condition that they shall not become the property of the buyer until paid for, does not take the case out of the rule: *Crompton v. Pratt*, 105 Mass. 255.

The right of appropriation by the parties is one that concerns the parties only, and a third party is not in a position to compel the appropriation in any particular way on account of the effect that it may have in his interest: *Case v. Flint*, 10 U. S. App. 415; *Arbuckle v. Chadwick*, 146 Pa. 393; *M. & F. Bank v. Heney Plough Co.*, 45 La. Ann. 1214; *Gordon v. Hobart*, 2 Story, 243; *Cole v. Withers*, 33 Gratt. 186. This applies to sureties and guarantors: *Harding v. Liff*, 75 N. Y. 461; *Kirby v. Marlborough*, 2 M. & S. 18; *Williams v. Rawlinson*, 10 Moore, 362; *Blanton v. Rice*, 5 Mon. 253; *Galtz v. Piel*, 26 Mo. App. 634.

The right to appropriate does not apply to payments made involuntarily by the debtor: *Blackstone Bank v. Hill*, 10 Pick. 129; *Commercial Bank v. Cunningham*, 24 Ib. 270; *Merrimack County Bank v. Brown*, 12 N. H. 320.

When neither party has made an application of the payment the court will apply it according to the following general rules: In the absence of anything to control the application of a payment, the authorities in the United States are to the effect that it will be applied to the debt the security of which is most precarious: *Field v. Holland*, 6 Cranch, 8; *Smith v. Lloyd*, 11 Leigh, 512; *Stamford Bank v. Benedict*, 15 Conn. 437; *Vance v. Monroe*, 4 Gratt. 52; *Field v. Holland*, 6 Cranch, 8; *Johnson's Appeal*, 37 Pa. 268; *McCurdy v. Middleton*, 82 Ala. 131; *Burks v. Albert*, 4 J. J. Mar. 97; *Thiac v. Jumonville*, 32 La. Ann. 142; *Gwinn v. Whitaker*, 1 Har. & J. 754; *Dedham Bank v. Chickering*, 4 Pick. 314; *Wood v. Callaghan*, 61 Mich. 402; *Hersey v. Bennet*, 28 Minn. 86; *Baine v. Williams*, 10 Sm. & M. 113; *Hilton v. Burley*, 2 N. H. 193; *Leeds v. Gifford*, 41 N. J. Eq. 464; *Pattison v. Hull*, 9 Cow. 747; *Trullinger v. Koford*, 7 Oreg. 228; *McQuaide v. Stewart*, 48 Pa. 198; *Garrett's Appeal*, 100 Ib. 597; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Langdon v. Bowen*, 46 Vt. 512; *McCauley v. Holtz*, 62 Ind. 205; *The D. B. Steelman*, 5 Hughes, 210; *Chester v. Wheelwright*, 15 Conn. 562; *Lee v. Fontaine*, 10 Ala. 505; *Livermore v. Claridge*, 33 Me. 428.

The English rule seems to be that money is first to be applied

to the secured debt, and it has been held in this country that if there be a mortgage debt and a simple account the court will apply the money to the mortgage: *Pattison v. Hull*, *supra*; *Dorsey v. Gassaway*, 2 H. & J. 402; *Robinson v. Doolittle*, 12 Vt. 246; *Anon.*, 12 Mod. 559. See *contra*, *Anon.*, 8 Mod. 236; *Chitty v. Naish*, 2 Dowl. 511; *Field v. Holland*, *supra*; *Planters' Bank v. Stockman*, 1 Freem. Ch. 502; *Hilton v. Burley*, 2 N. H. 193; *Jones v. Kilgore*, *supra*; *Moss v. Adams*, 4 Ired. Eq. 42; *Ramsour v. Thomas*, 10 Ired. 165; 2 Pars. Cont. 632, note (y). The appropriation will be made, other things being equal, to the older debt: *Toulmin v. Copeland*, 2 Cl. & Fin. 681; *McKenzie v. Morris*, *supra*; *Millikin v. Tufts*, 31 Me. 497; *Allstan v. Contee*, 4 Har. & J. 351; *Bloom v. Kern*, 30 La. Ann. 1263; *Allen v. Culver*, 3 Den. 284; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, *ib.* 512; *Genin v. Ingersoll*, 11 W. Va. 549; *Laing v. Campbell*, 36 Beav. 3; *Beale v. Caddich*, 2 H. & N. 326; *Frost v. Mixsell*, 38 N. J. Eq. 586; *Boody v. U. S.*, 1 Woodb. & Min. 150; *Helm v. Com'th*, 79 Ky. 67; *Sweet v. Wigley*, 3 M. & S. 174; *cf.* *Shaw v. Pratt*, 22 Pick. 305; *Killouri v. Bacon*, 57 Ga. 497, 18 Am. & E. Encl. of Law, 247; to a debt due in preference to one not yet matured: *Bohe v. Stickney*, 36 Ala. 482; *Heintz v. Cohn*, 29 Ill. 308; *Bacon v. Brown*, 1 Bibb, 334; *Effinger v. Henderson*, 33 Miss. 449; *Cloney v. Richardson*, 34 Mo. 370; *Seymour v. Sexton*, 10 Watts, 255; *Whitmore v. Murdock*, 3 Woodb. & Min. 390; *McDowell v. Blackstone Canal Co.*, 5 Mas. 11; *Cabada v. De Jongh*, 10 Phila. 422; *Hill v. Morrison*, 46 N. J. L. 488; *Anderson v. Mason*, 6 Dana, 217; to a legal debt in preference to a claim the debtor is not bound at law to pay: *Wright v. Laing*, 4 Dowl. & R. 783; *Ex parte Randleson*, 2 Deac. & Chit. 534; *Kean v. Branden*, 12 La. Ann. 20; *Dunbar v. Garrity*, 58 N. H. 575; *Stover v. Haskell*, 50 Vt.; *cf.* *Fletcher v. Gillan*, 62 Miss. 8; *Thurlow v. Gilmore*, 40 Me. 378; to the interest upon a debt rather than to the principal thereof: *People v. N. Y. Co.*, 5 Cow. 331; *Eberlin v. Palmer*, 10 N. Y. Supp. 660; *Steele v. Taylor*, 4 Dana, 445; *Anderson v. Perkins (Mont.)*, 25 Pac. 92; if neither the principal nor interest be due, then a payment will be applied ratably: *Jenks v. Alexander*, 11 Paige, 619. On running accounts the law will apply the payment according to priority of time,

the first item on the credit side going to discharge or reduce the first item on the debit side. See *supra*, and *Connor v. Armstrong*, 91 Ala. 265; *Steinberger v. Gowdy* (Ky.), 19 S. W. 186. This applies, although the earlier items of the account are barred by the statute of limitations, and the later items are not: *Fletcher v. Gillan*, 62 Miss. 8; or the earlier items accrued during the infancy of the debtor: *Thurlow v. Gilmore*, 40 Me. 378; and although one item is better secured than another: *Cushing v. Wyman*, 44 Me. 121; *Truscott v. King*, 6 N. Y. 147. Peculiar circumstances may, however, render this rule inapplicable, as where services have been rendered upon a special promise to pay for them in cash, in such case payment will be applied to such services, although a running account exist between the debtor and creditor: *Sanford v. Clark*, 29 Com. 457.

Liability of agent to account—Receiver.

DUNN v. JOHNSON.

(Supreme Court of North Carolina, November 20, 1894.)

In an action by the receiver of an insolvent banking association against its former cashier to recover a balance alleged to be in his hands, defendant may be required to submit an account, when this is necessary to ascertain the amount of said balance.

A complaint in an action by the receiver against the former cashier of an insolvent corporation, which alleges that defendant, in the course of his agency, received into his possession, of the funds of the corporation represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount, and that demand has been made upon him for the balance which went into his hands, and he has failed to pay it over to the receiver, states a cause of action.

Appeal from Superior Court, Sampson county; Brown, Judge.

Action by W. A. Dunn, receiver of the insolvent Clinton Loan Association (incorporated), against A. F. Johnson, its former cashier, to recover a balance alleged to be in his

possession. The defendant demurred. The demurrer was overruled, whereupon defendant appealed.

George Rountree, for appellant.

Robert O. Burton, for appellee.

MACRAE, J.—The defendant was cashier of a joint-stock company, a copartnership doing a banking business: *Faison v. Stewart*, 112 N. C. 332, 17 S. E. 157; *Bain v. Association*, 112 N. C. 248, 17 S. E. 154; *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155. By its articles of agreement, styled the "Constitution of the Clinton Loan Association," the duties of defendant as cashier were defined. "The cashier shall receive and hold, subject to the order of the board of directors, all moneys, notes, mortgages, bonds, policies of insurance, deeds, and other valuables belonging to the association." And by a further provision, "the board of directors, or any three of them, together with the cashier, shall constitute a finance committee, whose duty shall be to loan, invest and collect the moneys and other securities of the association as defined in the constitution and by-laws." It will appear from the above quotations that the cashier, while he may not have been invested alone with all the powers generally delegated to cashiers of banks, was the custodian of all the funds, securities and effects of the association, "subject to the order of the board of directors." He occupied the relation of a fiduciary while a member of the copartnership. He was also its servant and agent. The reception of its effects constituted him not simply a debtor. He had no separate authority to disburse, but was bound to pay over on request or order; and it was also provided that he should give bond for the faithful performance of his duties. It was not a case of deposit, like a bank and its depositor, where the bank could mingle the funds with its own, and use the same until drawn out; and it was in no sense a loan, as in *Hervey v. Devereux*, 72 N. C. 463. It was clearly akin to a pure trust. "The relation

of trust between the bank and cashier gives equity jurisdiction to compel an account for money misappropriated or other breach of trust:" 1 Morse, Banks, § 173. The gravamen of the charge here is that the defendant, as cashier, received into his possession all the moneys, notes, etc., of the association, and failed and neglected to account for a part of the same, but converted and fraudulently misappropriated it. The necessity of an account is set out in order that the true liability may be ascertained. We have been impressed with the very interesting and ingenious argument of the learned counsel for defendant to the effect that the defendant was neither bailiff, guardian nor receiver, and that, consequently, the old and now obsolete action of account would not lie against him. Without undertaking to decide whether this be so or not, we are entirely satisfied that a bill in equity for an account would be sustained, for where an agent is intrusted with money to be disbursed, his principal may sustain a bill against him for an account of his agency, and in some instances although no discovery is sought: Adams, Eq. 221, note; McCaskill v. McBryde, 2 Dev. 265. And we think it clear that under our present practice, in which legal and equitable relief may be demanded and obtained in the one form of action, this defendant may be held to account, the action being to recover a balance alleged to be in the hands of defendant, and an account being necessary to ascertain the amount of said balance if there be any. The old bill of discovery is dispensed with, but the law affords better facilities for reaching the desired end than were provided in the distinct equity system once in practice: Code, § 579 *et seq.* Old forms have been done away with, but principles of substantial justice ever remain. The association became incorporated. The corporation succeeded to its rights and liabilities, and, becoming insolvent, a receiver was appointed to take charge of and administer the assets. This action is not brought by a creditor, but it is the receiver who seeks through this

means to secure the effects of the insolvent corporation for the benefit of all parties in interest, and have distribution according to law: Code, § 668 *et seq.* His allegation is, in substance, that those assets have been wasted by the defendant, who had them in charge. If the defendant failed to turn over the property intrusted to him he might have been sued by the association or its successor, the corporation. While one copartner had no action at law against another to recover the partnership property to which each had equal title, the equitable jurisdiction to compass a dissolution of the partnership and the administration of its effects has always existed: 1 Story, Eq. Jur., § 463; *Marvin v. Brooks*, 94 N. Y., at page 81. This corporation, having succeeded to the rights of the copartnership, is now in liquidation under our statute, and, being under the control of the court, no one else can collect its assets but the receiver. Among its assets is this claim against the cashier of the copartnership association. If said cashier has not fully accounted for the property which came into his hands, the only remedy left is an action by the receiver against the cashier. If there were an ascertained balance in his hands there would be no necessity for an account; but the plaintiff, a receiver, alleges that a long account is necessary to enable the court to ascertain the sum for which judgment should be rendered against the defendant. Section 421 of the Code provides for a reference to state an account. If, upon the taking of such account before a referee, it should be found that defendant has had in his possession property of the association, and has not paid over the same to his successor, the opportunity is then offered the defendant to discharge himself of all liability by showing that such property has been disposed of by him by order of the directors, or has been dissipated in any way other than by his neglect or default.

It is further contended by the defendant that the complaint as amended is too vague and uncertain to require an answer. We reiterate what has more than once been said,

that the Code has by no means dispensed with that certainty and regularity in pleading which is essential to every system adopted for the administration of justice (*Rowland v. Windley*, 82 N. C. 131); and that now, as in the old equity practice, "there should be such certainty in the averment of the title upon which the bill is found that the defendant may be distinctly informed of the nature of the case which he is called upon to meet" (Story, Eq. Pl., § 241); that a charge of fraud in general terms is insufficient, and that to open a settled account specific errors should be pointed out. But if we should reject the charge of fraudulent misappropriation of the funds of the association, we still have the distinct allegation that the defendant, in the course of his agency, received into his possession of the funds of the association, now represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount; that a demand has been made upon him for the balance which went into his hands, and that he has failed to pay over the same to the receiver. Here is the foundation for an action in the nature of an *indebitatus assumpsit* upon an account stated, in which action it is not necessary to state the particular items constituting the debt: 1 Selw. Nisi Prius, 68. And the Code, as we have seen, provides the means for discovery and the statement of an account to ascertain the balance in the hands of the defendant, if any there be: *Marvin v. Brooks*, *supra*. Neither is there necessity in equitable proceedings of this character, if we look at it in the light of a bill for discovery and account, to state with precision each item of the balance claimed, for in such case there would be no necessity for a discovery or an accounting. It may be proper, however, to remark that every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, for otherwise he will not be permitted to offer or require any evidence of such fact. A general charge or statement, however, of the matter of fact is sufficient, and it is not

necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs: Story, Eq. Pl., § 28. Affirmed.

Where an agent is intrusted with money for the purpose of disbursements, a bill will lie against him at the suit of his principal for an account, and it is not essential that the bill pray discovery: *Kerr v. Steamboat Co.*, 1 Cheves, Pt. II, 189; *Hale v. Hale*, 4 Humph. 183; *Halstead v. Rabb*, 8 Port. 63; *Mason v. Man*, 3 Desau. 116. Mr. Bispham, Bisp. Eq., § 484, says: "When there is a duty to render an account—*e. g.*, on the part of an agent or steward, and discovery is refused, a bill will lie." Story, however, Eq. Jur., § 463, seems to recognize the liability of an agent charged with disbursement to a bill, even without a prayer for discovery; but there would seem to be no question that the bill may be maintained where discovery as well as account is sought.

Lien—Decedent's estate—Jurisdiction of federal court in equity.

WALKER ET AL. v. BROWN ET AL.

(United States Circuit Court of Appeals, Eighth Circuit,
September 10, 1894.)

[Reported 63 Federal Reporter, 204.]

Where one who has loaned bonds to a firm writes to a prospective creditor thereof "The loan of \$15,000, Memphis bonds, made by me to Mr. J. C. L. for the use of Messrs. L. & Co. . . . is with the understanding that any indebtedness they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, or that these bonds, or the value thereof are at the risk of the business of L. & Co., so far as any claim you may have against said L. & Co. is concerned," he does not create a lien on the bonds themselves, as he may at any time take them back by paying their value to the firm.

Where, in violation of such an agreement as is above recited, bonds are taken back by their owner without replacing them by their value, the creditor's remedy is at law by an action for breach of contract, and not in equity.

A federal court is not given jurisdiction to settle a decedent's estate in equity, after the English practice, by the mere fact that the citizenship of the parties gives jurisdiction to the federal courts; it cannot, therefore, entertain in equity what is a strict legal claim merely because the defendant is an administrator and the plaintiff a citizen of a state other than that of the defendant.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

In equity. Bill by James H. Walker, Columbus R. Cummings and William B. Howard against Anna L. Brown, Willis S. Brown and Edward L. Marsh, administrators of the estate of Tallmadge E. Brown, deceased.

The facts appear by the following statement taken from the opinion of the court.

This is a bill which was preferred by the appellants, composing the firm of James H. Walker & Co., of the city of Chicago, against the appellees, as administratrix and administrators, respectively, of the estate of Tallmadge E. Brown, deceased, to enforce an alleged equitable lien upon certain bonds of the city of Memphis, Tenn., aggregating in amount the sum of \$15,000. The bill charged that prior to May 9, 1889, the deceased, Tallmadge E. Brown, was a stockholder of the Lloyd Mercantile Company, he having theretofore transferred the bonds now in controversy to said corporation in payment for stock therein by him purchased; that on the 1st day of August, 1889, Brown became anxious to withdraw his capital from the Lloyd Mercantile Company, whereupon a partnership was formed by J. Collins Lloyd and Copley Lloyd, under the name of Lloyd & Co., which latter firm bought all of the assets of the Lloyd Mercantile Company, except the Memphis bonds aforesaid, which were at that time surrendered to said Brown, and also assumed to pay all of its debts, including a debt in the

sum of \$1,524, which was then due from the Lloyd Mercantile Company to the appellants. The bill further charged: That on the 20th day of September, 1889, the firm of Lloyd & Co. applied to the firm of James H. Walker & Co. to make a purchase of merchandise on credit, whereupon said Tallmadge E. Brown, for the purpose of inducing the appellants to extend such credit, executed the following agreement, in the form of a letter, to wit:

"CHICAGO, September 21, 1889.

"Messrs. James H. Walker & Co., Chicago, Ill.

"GENTLEMEN:—I beg to advise you that the loan of \$15,000, Memphis bonds, made by me to Mr. J. C. Lloyd for the use of Messrs. Lloyd & Company, Ellensburg, Washington Ter., is with the understanding that any indebtedness they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, or that these bonds, or the value thereof, are at the risk of the business of Lloyd & Company, so far as any claim you may have against said Lloyd & Company is concerned.

"Yours truly,

"T. E. BROWN."

That, in reliance on the agreement evidenced by the aforesaid letter, Walker & Co. thereafter extended credit to Lloyd & Co. in the sum of about \$13,000, between August 20 and December 11, 1889. The bill further alleged in substance that Lloyd & Co. failed on December 25, 1889, owing Walker & Co. at the time about \$13,000, no part of which has yet been paid; that prior to said failure Lloyd & Co. surrendered and returned to said Brown, without consideration, the Memphis bonds aforesaid; and that on the death of Brown, in the month of May, 1891, they passed into the custody of his administrators as assets of his estate.

The answer of the defendants denied, among other things, that Tallmadge E. Brown, in his lifetime, was a stockholder

of the Lloyd Mercantile Company, or that he had transferred the Memphis bonds in question to that corporation in payment for stock, as was alleged in the bill, or that he was in any wise responsible for any of the debts of the mercantile company when it ceased to do business, and when the firm of Lloyd & Co. was formed. It averred in substance that prior to the 9th day of May, 1889, Brown loaned the bonds now in controversy to the Lloyd Mercantile Company to enable it to raise money, and that said company, prior to May 9, 1889, pledged said bonds to secure a debt which it then owed to the city of Chicago; that the bonds remained pledged to secure said indebtedness of the mercantile company on the 21st day of September, 1889, when the aforesaid letter was written by Brown to James H. Walker & Co.; that Lloyd & Co. failed to pay this indebtedness when they were called upon to pay it, and that Brown paid the same in the month of November, 1889, and received said bonds from the pledgee; and that he afterwards, before his death, made a valid gift and delivery of the bonds to his wife, Anna L. Brown, one of the appellees, who was the owner of the same in her own right when the bill was filed. On the filing of the answer, which disclosed the fact that Anna L. Brown had become the owner of the bonds by a gift made in the lifetime of her husband, the appellants amended their bill of complaint by making the said Anna L. Brown a defendant in her own right. The Circuit Court made a decree dismissing the bill, and the plaintiff took this appeal.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

Henry S. Robbins, for appellants.

N. T. Guernsey, for appellees.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The Circuit Court appears to have dismissed the appel-

lants' bill of complaint upon the ground that the aforesaid agreement of September 21, 1889, did not create an equitable lien upon the bonds, and that no other matters were stated in the bill or proven on the trial which rendered the case one of equitable cognizance: *Vide Walker v. Brown*, 58 Fed. 23.

The first question presented for consideration by this court is whether the letter of T. E. Brown to James H. Walker & Co., of date September 21, 1889, had the effect of creating an equitable lien upon the Memphis bonds therein referred to, in favor of James H. Walker & Co., which lien a court of chancery will enforce. In his work on Equity Jurisprudence, Mr. Pomeroy says, and the authorities cited by him undoubtedly support the proposition—

"That every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or incumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property." 3 Pom. Eq. Jur., § 1235, and cases there cited.

The question arises, therefore, whether there is to be found in the letter in question, viewed in connection with the circumstances under which it was written, an expression of an intention on the part of T. E. Brown, now deceased, or a promise on his part, to make the particular bonds referred to in the letter a security for whatever credit the firm of James H. Walker & Co. might thereafter extend to Lloyd & Co. This letter appears to have been written by an agent

of James H. Walker & Co., at the city of Chicago, and to have been sent to the deceased at his residence, in the city of Des Moines, Iowa, where it was signed by him and returned through the mail to the appellants. The record shows in substance that Lloyd & Co. applied to the appellants to purchase certain merchandise on credit, and, at the time of such application, made a statement of the firm's assets and liabilities. At this interview the fact was disclosed to the appellants, and they appear to have been aware of the fact before the disclosure was made, that Lloyd & Co. were indebted to T. E. Brown in the sum of \$15,000 for bonds of the city of Memphis, which he had loaned to the firm, and which were then hypothecated to the Union National Bank of Chicago to secure a loan to that amount, which the firm of Lloyd & Co. was obligated to pay. The appellants refused to extend credit to Lloyd & Co. unless T. E. Brown, the owner of the bonds, would sign an agreement with respect to the return and surrender of the same which was satisfactory to the appellants. Thereupon, at the suggestion of Lloyd & Co., Mr. William A. Mason, in behalf of the firm of J. H. Walker & Co., dictated the aforesaid letter, as containing such an agreement as would be satisfactory to his principals and would induce them to extend credit to Lloyd & Co. With reference to his motive in formulating the letter which was subsequently signed by the deceased, Mr. Moore testified, in behalf of the appellants, as follows:

"We understood that Mr. Brown was a partner in the Lloyd Mercantile Company, or held stock in the Lloyd Mercantile Company, and that in making this change from the Lloyd Mercantile Company to Lloyd & Co. he had become a creditor instead of a stockholder, and we insisted that he must take the same position that he had before, so far as we were concerned; that the capital of Lloyd & Co. must be \$50,000, or about that, the same as of the Lloyd Mercantile Company."

We think that the letter of September 21, 1889, when considered by itself, without the aid of parol testimony, is fairly susceptible of but one interpretation, which is well stated in the foregoing extract from the testimony of the person by whom the letter was drafted. The appellants were advised that Brown had loaned Lloyd & Co. the sum of \$15,000 in Memphis bonds, which was being used by the firm as a part of its capital. They were willing to extend credit to the firm to a certain amount, if Brown would agree that the money thus loaned should not be withdrawn until the indebtedness of Lloyd & Co. to the appellants was paid, and that until such time the loaned capital should remain at the risk of the business of Lloyd & Co. The only undertaking on the part of the defendants' intestate that can fairly be extracted from the letter is a promise on his part that the capital loaned to Lloyd & Co. should not be withdrawn until the appellants' debt was paid. It is manifest, however, that the decedent did not intend to give the appellants a lien upon the Memphis bonds for the payment of such indebtedness as they might allow Lloyd & Co. to contract, and that he did not even intend to obligate himself to leave said bonds in the possession of Lloyd & Co. until such indebtedness was paid and extinguished, for his promise was clearly in the alternative—that said "bonds, or the value thereof, should be at the risk of the business of Lloyd & Company," so far as the appellants' claim was concerned. It will hardly admit of a doubt, we think, that within the contemplation of both parties to the agreement of September 21, 1889, the deceased had the right at any time to withdraw the Memphis bonds from the custody of Lloyd & Co., provided he left other securities of equal value, either money or property, in the hands of that firm, subject to the vicissitudes of its business. Indeed, the bill of complaint appears to have been drawn upon the theory that the deceased had the right to withdraw said bonds on the condition last stated, and that he had no intention of creating

a lien thereon, for the bill contains the following allegation :

“ Your orators were also unwilling to extend any credit to said Lloyd & Co. after and so long as said \$15,000 of Memphis bonds were withdrawn from said assets, and redelivered to said Brown as and for his own property ; and thereupon the said Brown, for the purpose of inducing your orators to permit the withdrawal by said Brown of said bonds, and to extend to Lloyd & Co. such further credit in the sale of merchandise as said Lloyd & Co. might desire, promised and agreed in writing, duly signed by said Brown, with your orators, on the 21st day of September, 1889, that, in consideration of your orators' extending further credit to said Lloyd & Co. as aforesaid, any indebtedness that said Lloyd & Co. should be owing to your orators at any time should be paid before there should be returned to him, said Brown, the said Memphis bonds so loaned to said Lloyd as aforesaid, or the value thereof.”

We must accordingly concur in the view which appears to have been taken by the Circuit Court—that the testimony failed to establish the existence of a lien, either legal or equitable, so far as the bonds now in controversy are concerned, and that at most it only tended to show that the deceased had violated his agreement not to withdraw the amount of capital which he had loaned to Lloyd & Co. until the debt of the appellants was paid. We must also concur in the further view of the Circuit Court that a court of law is competent to afford adequate relief for a breach of contract of that nature. The result is that the bill was properly dismissed, unless it be true that even in the absence of a lien the appellants had the right to go into a court of equity for an assessment of the damages which they had sustained.

This brings us to the consideration of the second proposition maintained by counsel for the appellants—that even in the absence of a lien, as charged in the bill, the

complainants below had the right to sue in equity for the enforcement of their demand. The contention in this respect goes to the extent of asserting that the holder of a purely legal demand against the estate of a deceased person may sue in equity in the United States Circuit Court for the proper district, for the establishment of his claim, if he happens to be a non-resident, and that in aid of such proceeding the court may take to itself the administration of the decedent's estate. The argument by which this conclusion is reached is very brief, and is to the following effect: It is said that the equity jurisdiction vested in the federal courts is such as was exercised by the High Court of Chancery in England at the adoption of the federal Constitution, and that the English courts of chancery had jurisdiction of bills to enforce the due administration of the estates of deceased persons. The proposition, if tenable, is certainly startling—that, notwithstanding the elaborate code of laws now in force in most of the states of this Union, regulating the subject of administration, the federal courts, as courts of equity, may nevertheless administer the estates of deceased persons at the instance of a non-resident creditor. While there are some expressions to be found in adjudged cases which perhaps give color to such an assertion, yet we think that it will be found on a careful view of the subject, and the circumstances under which such utterances have been made, that there is in fact no substantial ground on which to rest the exercise of the large jurisdiction above claimed. In the case of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, one of the earliest cases touching this subject which is to be found in the Federal Reports, Judge STORY held that the courts of the United States, as courts of equity, “possess jurisdiction to maintain suits in favor of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be by local jurisprudence a remedy at law on the administration bond in favor of the party.” The facts disclosed in this latter case

made it one of equitable cognizance on the ground of fraud. The proceeding was in substance a bill in equity to avoid a final judgment of a Probate Court settling the accounts of an administrator, which judgment had been obtained through the fraud of the administrator. Suits of that nature may doubtless be maintained in the national courts. In the case of *Hagan v. Walker*, 14 How. 29, 33, the following statement is found: "That a single creditor may maintain a bill against an administrator of a deceased debtor for a discovery of assets and the payment of his debt there can be no doubt." But this was said with reference to a case of which a court of equity, state or federal, clearly had jurisdiction on well-established equitable grounds, it being a case in which a judgment creditor of the deceased sought to reach property in the hands of a third party that had been conveyed to him by the deceased, in his lifetime, with intent to defraud his creditors. The case of *Union Bank v. Jolly's Adm'rs*, 18 How. 503, is also referred to, and apparently with great confidence, in support of the appellants' contention. That was a case, however, in which the complainant had obtained a judgment against the administrators of Jolly in the federal court pending the administration. The administrators refused to recognize or pay any part of this judgment, although they had assets in their hands, and were about to distribute such assets among the heirs of the deceased, claiming, as it seems, that the federal judgment was barred because the demand on which it was founded had not been allowed as a debt of the intestate, by certain commissioners appointed by the Probate Court, pursuant to state laws, to audit claims against the decedent's estate. On a bill filed by the complainant to compel the administrators to recognize and pay the judgment obtained against them in the federal tribunal, it was held in effect that a law of the state limiting non-resident creditors of deceased persons to suits in the state courts for the purpose of establishing their demands would not be enforced, and that such

non-resident creditors had the right to establish their claims by a suit in the appropriate federal tribunal, and that when so established they were entitled to recognition in the distribution of the assets of the deceased.

In the case of *Green's Adm'rs v. Creighton*, 23 How. 90, the principal question discussed was whether a non-resident creditor of a deceased person was entitled to sue in the federal court of the proper district for the establishment of his demand, notwithstanding the provisions of a state statute which required all demands against the estates of deceased persons to be allowed by the Probate Court. The court answered this inquiry in the affirmative, following its decisions in *Suydam v. Broadnax*, 11 Pet. 67, and *Union Bank v. Jolly's Adm'rs*, *supra*. It will be observed in this case that, when the court reached the decision of the question whether complainant's demand was one which entitled him to come into equity for its enforcement, it rested its decision upholding his right to sue in that forum upon the ground that a portion of the assets sought to be recovered were in the hands of the surety of the administrator of the deceased debtor, who had been joined as a defendant in the bill, and that as against such surety it was necessary to obtain a discovery in equity. The decision in question falls far short of establishing the proposition contended for in the case at bar, that upon an ordinary legal demand against the estate of a deceased person a suit can be maintained in equity as well as at law against his administrator or executor. Since the decision in *Green's Adm'rs v. Creighton*, establishing the right of a non-resident creditor to sue in the courts of the United States for the establishment of his demand against the estate of a decedent, it has been ruled in *Yonley v. Lavender*, 21 Wall. 276, that the creditor so obtaining a judgment in the federal tribunal cannot on that account take out an execution against the property of the deceased and cause it to be sold, but must come into the Probate Court of the state and take such a share of the

assets of the deceased as the administration laws of the state allow to creditors of his class. It was held in this case, in substance, that the administration laws of a state are not merely rules of practice for the courts of the state, but that they are laws limiting the rights of the parties, and that they will be observed in the federal courts in the enforcement of individual rights against the estates of decedents. See, also, in this connection the case of *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377, which decides that a proceeding against an administrator for the establishment of a demand against his decedent's estate is a suit which is removable to the federal courts when the creditor and the administrator are citizens of different states. Another case supposed to have an important bearing on the subject in hand, from which lengthy quotations have been made by counsel, is *Payne v. Hook*, 7 Wall. 425, 430. The general statement is found in this, as in some other cases, that "the equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses." But in that case it appeared that the administrator had grossly mismanaged the estate of the deceased; that he had made false settlements with the Probate Court—filed a false inventory therein; and that by this and other fraudulent means he had induced a non-resident distributee, who was the complainant, to sell her interest in the estate to the administrator for a grossly inadequate consideration. The main purpose of the bill appears to have been to cancel the alleged fraudulent purchase of the distributee's interest, and to obtain a decree against the administrator for its full value. There can be no doubt, we think, that the bill in this latter case contained allegations which entitled it to be entertained on that ground, and that it was so entertained, rather than upon the theory that the mere fact that an administrator was a party defendant rendered it a case of equitable cognizance. Probably the most elaborate as well as the latest expression of

the views of the Supreme Court of the United States on this interesting subject is to be found in the case of *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. In that case it was held, in accordance with well-established principles, that a non-resident creditor of an estate may establish a demand against the same by a suit in the federal court; also, that a non-resident distributee may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or proceed in any way which does not disturb the actual possession of the property by the state court. But it was said in that connection that the federal courts have no original jurisdiction in respect to the administration of decedents' estates, and that they cannot, by entertaining a suit against an administrator, as they may do in some cases, invest themselves with authority to determine all claims against it. Looking at the circumstances which gave rise to the last-mentioned decision, we find the fact to be that the debts of the estate had been paid, and that the administration proceedings had reached that point when it was the duty of the administrator to make distribution of the estate among those entitled to it. At this juncture a controversy appears to have arisen between the administrator and a non-resident distributee as to the amount of the latter's share in the estate, the determination of which controversy depended in part upon the true construction of the laws of descent of the state of Pennsylvania, and in part upon the question whether a testamentary clause in the will of the decedent, which was inefficacious as a will, could be given effect as a valid declaration of a trust. It was held in substance that a non-resident distributee was entitled to have both of these questions decided by the appropriate federal tribunal. The court did not decide, however, as is now contended, that the holder of an ordinary legal demand against the estate of a decedent may go into a federal court sitting in equity to establish the same merely because his demand is against

a dead man's estate. Moreover, it clearly appears in the case last cited that the cause of action was one of equitable cognizance, inasmuch as it involved the existence and enforcement of a trust.

The cases to which we have thus referred serve to illustrate the extent and the appropriate limits of the jurisdiction which the federal Circuit Courts now exercise in matters pertaining to the administration of the estates of decedents. They have an undoubted jurisdiction to establish demands exceeding \$2,000 against the estates of deceased persons, when that jurisdiction is invoked by a non-resident creditor ; and, if the demand sought to be enforced in the federal court by a non-resident creditor happens to be of an equitable nature, it may undoubtedly be enforced by a suit in equity, as distinguished from a suit at law. Speaking generally, we have no doubt that a non-resident may enforce any right or claim which he happens to have against the personal representative of a deceased person by a bill in equity in the appropriate federal tribunal, when such right or claim pertains to any of the recognized heads of equity jurisprudence, or when, for any reason, a court of law is unable to afford adequate relief. But the authorities in question do not support the contention that, in a suit to establish a purely legal demand against the estate of a decedent, the jurisdiction at law and in equity is concurrent so far as the federal courts are concerned. Nor do we perceive any reason why the equity powers of these courts should be invoked to establish a purely legal demand, since it is manifest that, as courts of law, they are able to afford the same measure of relief that can be obtained in equity. When a demand has been established in a federal court, whether at law or in equity, it cannot be enforced against the property of the decedent by execution in the ordinary form, but must await payment by the process of administration in the mode provided by state laws, which are binding alike upon the federal

and state tribunals: *Yonley v. Lavender and Union Bank v. Jolly's Adm'rs*, *supra*. Moreover, the federal courts, on a bill filed to establish a demand against an estate, cannot take to themselves the full administration of the estate, when it is undergoing administration pursuant to local laws, as the English chancery courts might have done under a creditor's bill: *Byers v. McAuley*, *supra*. The power of the federal court ceases with the establishment of the demand, unless it becomes necessary to take further action for the purpose of compelling the administrator or executor to recognize the validity of the federal judgment and give it full force and effect as an adjudicated claim against the estate. In other words, the jurisdiction of these courts over the administration of estates is less extensive than that which was formerly exercised by the English chancery courts. Their jurisdiction at best is but a limited one, depending as it does in all cases either upon the existence of a federal question or diverse citizenship; and they are bound, like the state courts, to render a faithful obedience, within certain well-defined limits, to local administration laws that have now rendered it possible to administer estates fairly and equitably without invoking the extraordinary powers of a court of chancery. Furthermore, the authority of the federal courts, as courts of equity, is circumscribed by the positive mandate of the judiciary Act that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law:" Rev. St., § 723. As we have before remarked, and as we now take occasion to repeat, a legal demand against a decedent's estate can now be as effectually enforced by a suit at law as by a bill in equity, and there is no necessity for resorting to the latter proceeding. No advantage is gained by suing in equity rather than at law, for the decree in that forum must stop short with the ascertainment and allowance of the creditor's demand; and if, in any case, or for any reason,

it becomes necessary to take further action against the administrator to enforce payment of the allowance, the power of the court, as a court of equity, may be invoked in aid of a judgment at law as well as in aid of a decree in chancery. We are of the opinion, therefore, that as the claim involved in the case at bar was an ordinary legal demand, which grew out of a breach of contract by the defendants' intestate, the complainants below should have sued at law to establish the demand, and that the bill was properly dismissed. The decree of the Circuit Court is therefore affirmed.

Every express executory agreement in writing which indicates an intention on the part of the contracting party that some particular property, real or personal, or a fund therein identified, shall be security for a debt or other obligation, or which contains a promise to convey or transfer the said property as security, creates an equitable lien on the property: *Fidelity Ins. T. & S. D. Co. v. Shenandoah V. R. Co.*, 33 W. Va. 761; *Willets v. Brown*, 42 Hun, 140; *Clarke v. Southwick*, 1 Curtis, 297; *Pinch v. Anthony*, 8 Allen, 536. The agreement must show that the parties intended to create a charge upon the property itself: *Briley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Briley*, 2 Meriv. 401; and see *Knott v. Shepherdtown Mfg. Co.*, 30 W. Va. 790. It is not enough that the parties show an intent that the proceeds of the sale of the property are to be applied to the payment of a certain debt: *Cook v. Black*, 54 Iowa, 693; *Rider v. Clark*, *Ib.* 292; *Stewart v. Hopkins*, 30 Ohio St. 502. The instrument creating the lien must plainly designate the property to be charged: *Mundy v. Munson*, 40 Hun, 304; and the property charged must be capable of identification: *Payne v. Wilson*, 74 N. Y. 348; *Gunnell v. Suydam*, 3 Sandf. 132; *Drake v. Taylor*, 6 Blatch. 14; *Parson v. Oberteuffer*, 59 How. Pr. 339; but the lien may be upon a changing stock of goods: *Arnold v. Morris*, 7 Daly, 498. An equitable lien under an agreement arises only when the terms and conditions contemplated by the agreement are fulfilled: *Bank of Washington v. Nock*, 9 Wall. 373; *Kelly v. Kelly*, 54 Mich. 30. An equitable

lien is not confined to property owned by the giver of the lien, or even to property in existence at the time of the agreement to grant a lien, but it will attach to the property contemplated so soon as the giver acquires title to and control thereof: *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Coates v. O'Donnell*, 16 Jones & Spen. 46; *Barnard v. Norwich & N. R. R. Co.*, 4 Cliff. 351; *Col v. Hart*, 6 Am. L. Reg. 27; *Kirksey v. Means*, 42 Ala. 426; *Bibend v. Liverpool & London F. & L. Ins. Co.*, 30 Cal. 78; *Tedford v. Wilson*, 3 Head, 311. A mere agreement to pay a debt out of a designated fund, when received, does not give an equitable lien thereon: *Wright v. Ellison*, 1 Wall. 16; *Christmas v. Russell*, 14 Ib. 69; *Trist v. Child*, 21 Ib. 441; *Dillon v. Barnard*, Ib. 430; *Williams v. Ingersoll*, 89 N. Y. 508; *Rogers v. Hosack*, 18 Wend. 319. There must be some distinct appropriation of the fund: *Rodick v. Gandell*, 12 Beav. 325, 1 De G., M. & G. 763; as where a debtor gives an order to his creditor entitling him to receive payment out of a certain fund: *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Ex parte South*, 3 Swanst. 393; *Fitzgerald v. Stewart*, 2 Sim. 333; *Lett v. Morris*, 4 Ib. 607; *Watson v. Wellington*, 1 Rus. & M. 602; *Malcolm v. Scott*, 3 Hare, 39; *Crowfoot v. Gurney*, 2 Moo. & Sc. 473; *Row v. Dawson*, 1 Ves. Sr. 332; *Yeates v. Groves*, 1 Ves. Jr. 280; *Trist v. Child*, *supra*; *Field v. The Mayor*, 6 N. Y. 179; *Powell v. Jones*, 72 Ala. 392; *Richardson v. Rees*, 9 Paige, 243. See Jones on Liens, §§ 29, 30, 31, 32, 33, 34, 36, 38, 42, 43, 48, 50.

Dower—Release by ante-nuptial contract—Consideration—Misunderstanding—Confidential relation.

GRAHAM v. GRAHAM.

(Court of Appeals of New York, November 27, 1894.)

[Reported 143 New York, 573.]

Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party

in whom the confidence is reposed or whose influence is the dominant one and to the detriment of the other party, the former will not be permitted to enforce the agreement, unless it appear that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement.

This rule applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him.

In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared indisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the general term properly reversed on the facts a judgment of special term in favor of defendant; and that plaintiff was entitled to the relief sought.

(Argued October 15, 1894; decided November 27, 1894.)

Appeal from judgment of the general term of the Supreme Court in the First Judicial Department, entered upon an order made February 24, 1893, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at special term.

Reported below, 67 Hun, 329.

This action was brought by plaintiff against defendant, her husband, to have an ante-nuptial agreement canceled and declared void.

The facts, so far as material, are stated in the opinion.

James A. Deering, for appellant.—The ante-nuptial agreement executed between the parties to this action is a valid legal instrument and binds the parties thereto by its terms:

Story's Eq. Juris. 1297, 1370; *Simpson v. Gutteridge*, 1 Madd. 609; *Naill v. Naun*, 25 Md. 532; *Jacobs v. Jacobs*, 42 Iowa, 600; *Barth v. Lines*, 118 Ill. 374; *Wentworth v. Wentworth*, 69 Mo. 17; *Findley v. Findley*, 11 Gratt. 434; *Peck v. Peck*, 12 R. I. 485; *Miller v. Goodwin*, 8 Gray, 542; *Jenkins v. Holt*, 108 Mass. 261; *Weaver v. Weaver*, 109 Ill. 225; *Andrews v. Andrews*, 8 Conn. 79; *Withers v. Weaver*, 10 Barr, 391; *Pierce v. Pierce*, 71 N. Y. 154; *Peevit v. Wilson*, 103 U. S. 22; *Herring v. Wickham*, 29 Gratt. 628; 4 Kent's Com. (5th ed.) 463, 494; *Sterry v. Arden*, 1 Johns. Ch. 261; *Huston v. Cantril*, 11 Leigh, 136; *Tunis v. Trezevant*, 2 Desaus. 264; *Whelan v. Whelan*, 3 Cow. 79, 538; *Maguire v. Thompson*, 7 Pet. 348; *Andrews v. Jones*, 10 Ala. 400; 14 Am. & Eng. Ency. of Law, 544; *Michael v. Morey*, 26 Md. 239; *Riley v. Riley*, 25 Conn. 154; *Brown v. Jones*, 1 Atk. 188; *Stileman v. Ashdown*, 2 Ib. 498; *Wheeler v. Caryl*, Amb. 121; *Marshall v. Morris*, 11 Ga. 368; *Armfield v. Armfield*, 1 Freem (Miss.), 311; *Roberts v. Roberts*, 22 Wend. 140; *Rivers v. Thayer*, 7 Rich. (So. Car.) Eq. 136; *Neves v. Scott*, 9 How. (U. S.) 196. The court below erroneously reversed the action of the special term on the question of fact in the case: *Swazey v. Berger*, 125 N. Y. 677; *Kemp v. Peck*, 35 N. Y. S. R. 780; *Van Der Zee v. Herman*, 35 Ib. 778; *Crim v. Starkweather*, 36 Ib. 314; *Phillips v. Meily*, 106 Pa. 356; *Thomas v. Loose*, 114 Ib. 35; *Kessler's Estate*, 143 Ib. 386; *Smith v. Brush*, 1 Johns. Ch. 459; *Walton v. Hobbs*, 2 Atk. 19; *Sullivan v. Bates*, 1 Litt. 41; *Flagg v. Mann*, 2 Sumn. 486, 550.

George Bliss, for respondent.—The paper is absolutely without validity. Under the statute, to make a release of dower by an intended wife of any force, there must be a pecuniary provision for her benefit in lieu of dower: 1 R. S. 741, 9, 10, 11, 12, 13, 14; *Ennis v. Ennis*, 48 Hun, 11; *McCartee v. Teller*, 2 Paige, 571; *Hawley v. James*, 5 Ib. 318; *Jones v. Fleming*, 104 N. Y. 418. The decision of the

trial justice was wrong, and was properly reversed at general term because it is clear that, whether the paper was read to her or not, Mrs. Graham did not understand the meaning of the paper she signed, while to make such a paper valid it is peculiarly necessary that it should be proved beyond all question that it was executed with full understanding of its effect. And where the provision is disproportionate and inadequate the burthen is on the husband to show good faith: *Pierce v. Pierce*, 71 N. Y. 154.

ANDREWS, C. J.—The order of the general term, from which the appeal is taken, reversed, both on the facts and law, the judgment in favor of the defendant entered upon the decision of the special term. The trial judge found that the ante-nuptial agreement was executed by the plaintiff voluntarily and understandingly, and was valid and binding both in law and equity. The judgment followed the decision, and dismissed the complaint on the merits. The general term held that the agreement by which the plaintiff, without any consideration except that arising out of the contemplated marriage between the parties, consented to release and discharge all claim to dower in the estate of the defendant in case she survived him, and that she would make no claim to any share in his personal estate, unless under his will, or some act done by him subsequent to the execution of the agreement, was void. This conclusion was placed upon the ground that an agreement by which a woman, in contemplation of marriage, surrendered any future right to dower in the estate of her intended husband, which might accrue to her on the marriage, required for its support a pecuniary provision, in property or money, under the statutes relating to jointures (1 Rev. St., p. 741, §§ 10–13), and that marriage alone was not a sufficient consideration. The general term further decided that conceding the validity of an ante-nuptial agreement for the release of dower, based on the consideration of marriage, and in the

absence of any pecuniary provision, the judgment should nevertheless be reversed, and the case be remitted for a new trial, for the reason that the evidence did not satisfy the appellate court upon the point that the agreement in question was executed by the plaintiff with an understanding of its effect, and that the law which casts upon a husband claiming under such an agreement the burden of showing that the intended wife was advised of and understood the nature and effect of the agreement when she executed it, had not been satisfactorily discharged. If the general term was justified under the rules which govern the exercise of its appellate jurisdiction, to reverse the judgment and grant a new trial upon the facts, then the order of the general term must be affirmed, irrespective of what our view might be upon the question of law determined by that court, because on the other branch of the case the order of reversal must be upheld.

By the terms of the agreement of July 3, 1890, the plaintiff, between whom and the defendant a contract of marriage had existed from some time in June, surrendered, without any pecuniary consideration whatever, the valuable interest which, on the marriage, she would acquire as wife, in the real estate of her intended husband. That this was to her an important transaction is shown by the conceded fact that the defendant was the possessor of real estate of the value of \$100,000, and that the value of the plaintiff's inchoate right of dower therein on her marriage (two days after the agreement was made) would have been, except for her release, at least \$8,900. The subject of dower had never been broached between the parties prior to the very occasion when she was called upon to execute the agreement, nor is it claimed that the subject of a marriage settlement was ever suggested by either. The first suggestion of the propriety of any ante-nuptial agreement came from the defendant on the Sunday evening preceding the Thursday when the agreement in question was executed. The defendant states

the conversation between himself and the plaintiff as follows: "I told her I would like to have my real estate matters fixed up, so I would have nobody interfering; so that I could use it freely whenever I would like, sell it, or buy real estate, and nobody to interfere. She said, 'All right.'" The plaintiff, referring to this conversation, testified: "He said, 'If we are going to be married I think it necessary that you should see a lawyer.' I said, 'Well, I don't think so.' He said, 'Business is business.' I said, 'My marriage is not business. I have nothing to see a lawyer about.' He said, 'Well, you come and see mine;' and I said, 'Certainly I will.' He did not tell me why he wanted me to go and see a lawyer. He did not say anything about signing any papers." Both parties were fully examined on the trial. The defendant did not deny any part of the plaintiff's testimony on the subject of the conversation on Sunday evening. It is uncontradicted that the subject of dower was never, in terms, referred to between the parties before the agreement was executed, and there was no negotiation between them on the subject. The defendant, according to his testimony, did inform the plaintiff that the purpose of consulting a lawyer was to have it arranged so that he could buy and sell real estate, "and nobody to interfere." This might have led a person acquainted with legal matters to understand that it related to an arrangement about dower; but, at best, the reference was vague and would not be likely to be understood by the plaintiff. The evidence is uncontradicted that after this conversation, and without any further conversation or consultation with the plaintiff, the defendant instructed his attorney to draw up an ante-nuptial agreement between the parties, whereby, in consideration of the sum of \$5,000 to be paid the plaintiff by the defendant, she consented to discharge all claim of dower in his estate, and to any share of his personal property, unless given her by his will, or other act of the defendant. Neither the sum of \$5,000, nor any

other sum had been mentioned between the parties, nor had the subject of a pecuniary provision for the wife been suggested between them. On the day fixed by the defendant the parties met at the office of the defendant's attorney. There is some conflict of testimony as to what occurred on that occasion. It is conceded that when the sum of \$5,000 was mentioned, as intended to be given to the plaintiff, she refused to receive it, saying, "I can't have any money mixed up with my marriage." The parties then left the office of the attorney, to return when a new paper should be prepared. They returned to the office after an hour or more, and then another instrument, similar to the first one, except in the expression of the consideration, was executed, which is the agreement in question. The plaintiff testifies that the subject of dower was not mentioned in the conversation on that occasion, and that the paper was hurriedly read over to her, and executed, and that she did not understand that she was releasing her dower, or any right in the estate of the defendant. She said, "My understanding of the nature of the papers which I signed was to give Mr. Graham full control of his business;" and again, "I understood I was giving my husband full control of his property, free from any interference with me." She also testified that she did not understand the legal meaning of "dower." The defendant, in his testimony, did not claim that anything was said on the subject of dower when the agreement was executed. The attorney for the defendant was a witness in his behalf, and in his testimony occurs the only contradiction to the testimony of the plaintiff on this subject. He testified that when reading the first instrument, when he came to the \$5,000 clause, she said, "Oh! no, I don't want any money," and when he finished reading she said: "The paper is all right with the exception of the \$5,000. I will not take any of Mr. Graham's money. I am not marrying him for money." Mr. Graham said, "Well, I won't carry out the ceremony unless you release your dower in my

property." She said, "I am willing to, but I don't want to take any money."

There seems to be no appropriate relation between this declaration of Mr. Graham, to which the attorney testified, and the conversation which preceded it, in which the plaintiff is represented as acquiescing in the proposed arrangement, with the exception stated. We have referred in some detail to the main evidence bearing upon the question whether the plaintiff executed the ante-nuptial agreement understandingly. It is an important general rule which does not permit a formal written agreement to be set aside or disregarded without strong evidence of fraud or mistake. But where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed, or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that his conduct was characterized with the utmost good faith, and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement made. This rule has been applied in favor of the wife in respect to ante-nuptial contracts. The relations between the intended wife and her future husband are regarded as confidential, and naturally give to the man great influence over the woman with whom he has entered into an engagement of marriage. The courts regard with rigid scrutiny an ante-nuptial contract which deprives her of any prospective interest in the estate of her intended husband, and especially is this required in a case where such relinquishment on her part is made without any provision for her support in case she survives him: *Pierce v. Pierce*, 71 N. Y. 154; *Kline v. Kline*, 57 Pa. St. 120; 64 Pa. St. 122. It cannot be said that in this case there is no evidence that the plaintiff understood the trans-

action. But, to summarize what has been said, it is substantially undisputed (1) the relinquishment of dower was not a condition of the engagement of marriage ; (2) there was no negotiation between the parties on the subject before they met and executed the agreement ; (3) the defendant, in the conversation between himself and the plaintiff, did not disclose to her that an arrangement to give him the right to control his business, and buy and sell real estate, without interference, would mean a relinquishment of her dower right ; (4) she received no equivalent for the surrender of her right. The evidence of the attorney for the defendant, and of his clerk, who took the acknowledgment of the instrument, warrant an inference that she understood its purpose. But she expressly denies their testimony in material points, and, even if dower was spoken of on the occasion of the execution of the instrument, she may not have understood its legal significance, and she testifies that she did not understand it. She acted without the aid of counsel, and concededly not in pursuance of any prior understanding with her husband, of which this specific agreement was the outcome.

We think the general term was justified in reversing the judgment on the facts. The order should therefore be affirmed, and judgment absolute entered, in pursuance of the stipulation. All concur. Ordered accordingly.

Bar of dower by an ante-nuptial contract is of equitable origin. At common law no right could be barred before it accrued, and no estate of freehold could be barred by any collateral satisfaction or recompense: Co. Litt. b.; *Vernon's Case*, 4 Co. 1. The equitable bar by ante-nuptial contract probably had its origin in provisions which failed of effect as legal jointures, but which were, nevertheless, of such a character as to put the widow to an election between them and dower, and so gave rise to a sort of equitable jointure not enforceable at law, but good in equity: 1 Shars. & Budd's Lead. Cas. in R. P. 351; *Logan v. Phillips*, 18

Mo. 22; *Gardner v. Gardner*, 10 R. I. 211; *Gelzer v. Gelzer*, 1 Bail. Eq. 387.

Almost any *bona fide* and reasonable agreement made before marriage to secure the wife in the enjoyment of a competent estate or support during her life will be upheld as a good antenuptial agreement; and it has been said that any provision which a person, able to contract, agrees to accept before marriage will be a good equitable bar to dower: *Andrews v. Andrews*, 8 Conn. 79; *Gibbon v. Gibbon*, 40 Ga. 562; *Heald's Petition*, 22 N. H. 265; *Sellech v. Sellech*, 8 Conn. 85, note. Even an illiberal provision will be held a good bar if it does not appear that the contract was brought about through undue influence or by taking advantage of the ignorance of the woman, and the provision is not so unconscionable that it should not be enforced: *Peet v. Peet*, 81 Iowa, 172.

The provision must, however, be fair and reasonable: *Gould's Exr. v. Womack*, 2 Ala. 83; *Grogan v. Garrison*, 27 Oh. St. 50; *McCartee v. Teller*, 2 Paige, 511; and the fairness and reasonableness must be considered with reference to the value of the husband's estate and of the dower relinquished; and it is held that where there is a gross disparity between the provision and the dower relinquished, the burden is thrown on those who seek to uphold the contract to prove the good faith of the transaction, and that the intending wife had full knowledge of all that materially affected it: *Taylor v. Taylor*, 144 Ill. 436; *Achilles v. Achilles*, 151 Ib. 136.

As a rule, where the agreement is simply that the wife shall have control of her own property with power to dispose of it by will, it will not be a good bar: *Swaine v. Perine*, 5 Johns. Ch. 482; *Whitehead v. Middleton*, 2 How. (Miss.) 692; *Blackman v. Blackman*, 16 Ala. 633; *Adams v. Adams*, 39 Ib. 274; but see, *contra*, *Cauley v. Lawson*, 5 Jones Eq. 132; *Stilley v. Folger*, 14 Oh. 610; *Wentworth v. Wentworth*, 69 Me. 247; and a mutual release of all rights in each other's property by the intending husband and wife, there being no fraud or concealment of true state of the property of the husband, will make a good bar: *McGee v. McGee*, 91 Ill. 548; *Andrews v. Andrews*, 8 Conn. 79; *Peck v. Peck*, 12 R. I. 485; *Barth v. Lines*, 118 Ill. 374; *McNutt v. McNutt*, 116 Ind. 545; *Forwood v. Forwood* (Ky.), 24

Rep. 588; *Davis v. Wood*, 31 N. Y. S. R. 604 (the circumstances of the case were somewhat peculiar), and see *Culberson v. Culberson*, 37 Ga. 296. A mere agreement not to claim dower has been held to be against public policy: *Curry v. Curry*, 17 N. Y. S. C. 367; *Ennis v. Ennis*, 48 Hun, 11; but there are authorities which hold that marriage *per se* is a sufficient consideration to support an agreement in bar of dower: *Wentworth v. Wentworth*, 69 Me. 247; *Magniac v. Thompson*, 7 Pet. 348; *Deshon v. Wood*, 148 Mass. 132; *Hafer v. Hafer*, 33 Kan. 449; *Gackenbach v. Brouse*, 4 W. & S. 546; *Bowman's Appeal*, 1 Walk. (Pa.) 11; *Wind v. Haas*, 8 Pa. C. C. 645; but it would seem that the consideration of marriage must embrace the support and companionship which usually follow its celebration. See *Spiva v. Jeter*, 9 Rich. Eq. 434. This is supported by the rule that the mere agreement without performance is no bar: *Johnson v. Johnson's Adm'rs*, 23 Mo. 561; *Bremer v. Gauch*, 85 Ill. 368; *Sheldon v. Bliss*, 8 N. Y. 31; *Sargent v. Roberts*, 34 Me. 135. *Vincent v. Spooner*, 2 Cush. 467, seems *contra*, but depends on the Massachusetts statute, R. S., c. 60, §§ 8, 9.

To be a valid bar the contract must be in good faith, and no advantage must be taken of the intending wife's confidence in her future husband, as the relation of betrothed persons is in a high degree one of confidence, and is one of those which give rise to the requirement of *uberrima fides* in transactions between persons standing therein to each other: *Kline v. Kline*, 57 Pa. 120; *Tiernan v. Borim*, 92 Ib. 248; *Spear's Appeal*, 121 Ib. 302; *Page v. Horne*, 11 Beav. 227; and if there appear to be any abuse of that confidence, equity will set aside the contract on the ground of constructive fraud: *Kline v. Kline*, *supra*; *Farrow v. Farrow*, 1 Del. Ch. 457; *Pierce v. Pierce*, 71 N. Y. 154; *Darlington's Appeal*, 86 Pa. 512; *Shea's Appeal*, 121 Pa. 302; *Russell's Appeal*, 78 Ib. 268; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Huguemin v. Baseley*, 14 Ves. 273; *Hoghton v. Hoghton*, 15 Beav. 278; *Pulling's Estate* (Mich.), 52 N. W. 1116; *Spurlock v. Brown*, 91 Tenn. 241; and a contract obtained by fraud is not capable of ratification during the coverture: *Peaslee v. Peaslee*, 147 Mass. 171; but in *West v. Walker*, 77 Wisc. 557, it was held that where, after marriage, a woman had agreed to an alteration of an ante-nuptial contract, by which

property was added to that secured to her by the original contract, she had waived her right to take advantage of the fact that, before the marriage, she had been deceived by her husband with reference to the amount of property owned by him.

In passing upon the question of fraud in an ante-nuptial contract, the court will, as above intimated, take into consideration the proportion borne by the provision to the means of the intended husband. As said by SHARSWOOD, J., in *Kline v. Kline*, *supra*: "While it might not be necessary to show affirmatively that there was a full disclosure of the property and circumstances of each, yet if the provision secured for the wife was unreasonably disproportionate to the means of the intended husband, it raise the presumption of designed concealment and threw upon him the burden of disproof." In the following cases the ante-nuptial contract has been set aside, viz.: where the man concealed from the woman three-fourths of his property, agreed to give part of a dwelling-house and \$40 per annum, and died some years later worth some \$15,000 besides the dwelling-house, the entire value of which, with the lot on which it stood, was \$800: *Kline v. Kline*, *supra*; where an illiterate woman made her mark to an agreement to take, in lieu of dower, a house and \$30 a month if she survived her husband, and there was no proof that the paper was explained to her, but there was evidence that she regarded it as a protection against her stepchildren: *Shea's Appeal*, 121 Pa. 324; where the consideration was \$500, to be paid if the wife survived the husband, when the man's realty was worth \$25,000, and the bride thought that in addition to the \$500 she was to receive \$500 in cash and a deed of a house and lot, and her husband allowed her to rest in error: *Pierce v. Pierce*, 71 N. Y. 154; and see *Woodward v. Woodward*, 5 Sneed, 49; *Hinkle v. Hinkle*, 34 W. Va. 142; *Pulling's Estate*, 52 N. W. 1116. But see *Bierer's Appeal*, 92 Pa. 265; *Warner v. Warner*, 18 Abb. N. Cas. 151. In *Ludwig's Estate*, 101 Pa. 535, one dollar and a comfortable support during her life, and, at her death, "a decent Christian burial" was held sufficient, when the effect of the contract was explained and the woman told that the husband had "a large property," though its value was not communicated. In *Smith's Appeal*, 115 Pa. 319, where the consideration for the release was a property

worth about \$12,500, and the man died seventeen years later, leaving an estate of \$400,000, and bequeathing his wife the interest of \$15,000, having been worth at the time of his marriage \$175,000, and having six adult children by a former wife, it was held that there was no presumption of fraud or concealment; in *Barth v. Lines*, 118 Ill. 374, a contract between a widower with nine children, who owned land worth over \$80,000 and some personalty, and his intended wife, who conducted a store, whereby there was a mutual release of rights in each other's property, was upheld, on proof that the wife knew what she was doing; and see *Neely's Appeal*, 124 Pa. 406; *Kesler's Estate*, 143 Ib. 386; *Tarbell v. Tarbell*, 10 Allen, 278; *Sullings v. Richmond*, 5 Ib. 280; *McNutt v. McNutt*, 116 Ind. 545; *Jacobs v. Jacobs*, 42 Iowa, 600; *Hafer v. Hafer*, 33 Kan. 449; *Farwood v. Farwood* (Ky.), 24 Rep. 588.

An agreement that the wife shall share equally with the heirs of her husband is a good bar: *Brooks v. Austin*, 95 N. Car. 474.

Adding parties in equity—Jurisdiction—Receivers.

WHITNEY *v.* HANOVER NATIONAL BANK *ET AL.*

(Two cases.)

SAME *v.* BANK OF GREENVILLE *ET AL.*

(Supreme Court of Mississippi, April 9, 1894.)

One cannot be made a defendant to a bill in equity on his own application, against the objection of the complainant.

In the absence of statutory authority the appointment of a receiver for a bank on its *ex parte* application is void, and therefore can be assailed collaterally.

Under the Constitution of 1890, § 147 of the state of Mississippi, which provides that no judgment or decree shall be reversed or annulled on the ground of want of jurisdiction, based on a mistake as to whether the cause was of equity or common-law jurisdiction, the appointment by a chancery court of a receiver for the property of a bank, where the bank

has abandoned it, at the suit of a general creditor cannot be attacked on the ground that the creditor should first have obtained a judgment at law.

Appeals from Chancery Court, Washington county; W. R. TRIGG, Chancellor.

Proceedings between George Q. Whitney and the Hanover National Bank and others relative to the funds of the Bank of Greenville. The facts appear in the opinion *infra*.

Nugent & McWillie and *S. H. King*, for appellant.
Yerger & Percy, for appellees.

CAMPBELL, C. J.—These three cases were argued and submitted together, and will be so considered. Their history is this: The Bank of Greenville was found to be insolvent, and came to a stop, on the 22d day of December, 1891, when the directors, headed by the president, applied, by petition to the chancellor, to take charge of the assets of the bank, by appointing a receiver to collect and manage its affairs. The chancellor appointed the president of the bank receiver, and, on his application, enjoined all persons from proceeding by suit against it. The receiver appointed entered upon his duties as designated, and continued until he resigned, on the 6th of July, 1892. On July 11, 1892, the Hanover National Bank and other creditors of the Bank of Greenville exhibited their bill, in the Chancery Court in which the receiver had been appointed, against the Bank of Greenville, and averred the foregoing facts, and that since December 22, 1891, the officers and directors of the bank had ceased to manage it, and that its affairs had been managed wholly by Pollock, as receiver, who had collected a large sum of money due said bank, and that the appointment of another receiver was necessary for the preservation of the assets of the bank and the protection of the rights of its creditors; with other specific allegations, designed to show the necessity for the immediate

appointment of a receiver. Upon due notice to the defendant a receiver was appointed in this proceeding on July 18, 1892, and the former receiver was directed to deliver to him all the assets of the bank in his hands. On July 23, 1892, George Q. Whitney and others, creditors of the Bank of Greenville, united in a bill against the bank and G. D. Thomas, who had qualified and was acting as receiver by virtue of his appointment on July 18, and against other defendants, in said Chancery Court. This bill set forth the suspension of the bank on December 22, 1891, and the appointment by the chancellor of Pollock as receiver on the application of the president and directors of the bank, and that Pollock took exclusive control of all the assets of the bank, and acted as receiver, but that defendant Thomas, at the time of exhibiting said bill, claimed to be receiver of said bank by virtue of an appointment by the chancellor of said court; that the application to the chancellor on December 22, 1891, and all the proceedings had, including the procurement of the appointment of Thomas as receiver, were devices to hinder, delay and defraud creditors, and "invalid and void." Discovery was sought by the bill as to all the assets of the bank, of whatever kind, and a lien upon them prayed to be established from the date of filing the bill, and their appropriation to the demands of the complainants. The Bank of Greenville interposed a plea to this bill of the proceeding by the Hanover National Bank *et al.* v. Bank of Greenville, and the appointment in that case of Thomas as receiver, and that he had qualified as such, and was in possession of the assets of the bank under that appointment, and relied on this plea as a bar to the bill filed July 23, 1892. The plea was set down for hearing upon its sufficiency, and was sustained, and the bill dismissed. From that decree an appeal was taken, and case No. 7,460 on the docket of this court is that appeal.

On October 4, 1892, George Q. Whitney petitioned the

Chancery Court of Washington county, in which these cases were pending, and which had been consolidated, setting forth that he was a creditor to a large amount of the Bank of Greenville, and had recovered judgment for a large sum against it in the court of the United States at Vicksburg, Miss., July 28, 1892, which had been duly enrolled, and, he claimed, was a paramount lien on all the assets of said bank, notwithstanding all the various proceedings in the said Chancery Court, which are set forth with detailed particularity, and denounced as void and no obstacle in law to the application of the assets of the bank to the claim of the petitioner, who prayed to be allowed to be made a party defendant to said cause. At the same time he presented a petition and bond for removal of said cause, in which he prayed to be made a defendant, to the United States court at Vicksburg. The complainants in the cause in which Whitney sought to intervene as a defendant opposed his application, and it was denied by the court, and from this he appealed, and that appeal is contained in No. 7,459 on the docket of this court.

Defeated in his effort to be made a defendant as stated, Whitney made an abortive effort to have the United States court at Vicksburg take charge of his suit, and enforce his claim to be paid out of the assets of the Bank of Greenville in preference to other creditors; but with that we have no concern, and state the facts historically only, being in the record before us. On February 6, 1893, Whitney, who had been baffled in all his efforts to obtain payment as a creditor entitled to precedence out of the assets of the Bank of Greenville, exhibited an original bill in the Chancery Court of Washington county against the complainants in the bill of the Hanover National Bank and others against the Bank of Greenville, exhibited July 11, 1892, and the Bank of Greenville and W. A. Pollock, receiver, and G. D. Thomas, receiver. In this bill is narrated with detail the history of the dealing by and with the bank from the time of its suspension

and taking refuge from the creditors in the Chancery Court to the filing of this bill, which also relates the persistent, but ineffectual, efforts of the complainant, in state and federal courts, to secure recognition of his right, as claimed, to be first paid out of the assets of the Bank of Greenville. It assails the action of the Chancery Court of Washington county as void for want of jurisdiction over the subject-matter dealt with, and seeks to vacate all orders that stand in his way, and the payment of his as a preferred claim out of the effects of the bank. The bill seeks an injunction, which was obtained. This bill was answered, and most of its allegations admitted, but the claim made by it to the right of the complainant to priority of payment out of the assets of the bank was denied. A motion was made to dissolve the injunction, and some affidavits were taken, and some facts were agreed on for the hearing of the motion to dissolve, and it was agreed that the case should be heard on the motion to dissolve, and for final decree on such hearing. The respondents gave notice of a claim of damages to be allowed on dissolution of the injunction to amount of \$2,500 for attorney's fees in defense of the suit. The case was heard in accordance with the agreement, and a decree was made dissolving the injunction, dismissing the bill, and awarding damages against the complainant in the sum of \$2,000 as attorney's fees, the decree reciting that the court had heard testimony in open court as to the attorney's fees, and taxed the cost against the complainant, who appealed, and this is No. 7,749 of the docket of this court.

From this complete but succinct history of this litigation, as disclosed in voluminous form in the three cases before us, it is apparent that the only question presented for decision by the appeal in No. 7,459 is as to the propriety of the action of the court in refusing to permit Whitney to intervene as a defendant in the case of *Hanover National Bank et al. v. Bank of Greenville* against the objection of the complainants, who protested earnestly against it. The

court did right in this refusal. "No such practice is known in equity as making a person a defendant to a suit upon his own application over the objection of the complainant." 1 Daniell, Ch. Pl. & Pr. 287, note 2, and cases cited; *Stretch v. Stretch*, 2 Tenn. Ch. 140, where the subject is fully treated, and the action of the court in the case before us is fully vindicated on principle and authority.

The question presented by cases 7,460 and 7,749 is whether the Chancery Court of Washington county was so wanting in jurisdiction of the case of Hanover National Bank and others exhibited against the Bank of Greenville, July 11, 1892, as to render its action in the case void and liable to be assailed collaterally, and treated as a nullity, whenever and however called in question; for, if it be conceded that the action of the court was erroneous, unless it was void, the fact that it had assumed jurisdiction, and taken control of the assets of the Bank of Greenville and appointed a receiver in the case, was an answer to the original bill exhibited by Whitney and others on July 23, 1892, and likewise to Whitney's bill of February 6, 1893. We regard the action of the chancellor on December 22, 1891, appointing a receiver on the *ex parte* application of the directors of the bank and his subsequent action in pursuance of that appointment, as utterly void and of no legal effect. It could be assailed collaterally and disregarded with impunity by anybody. The proposition that an insolvent debtor can take refuge in a chancellor's decree on his or its own application, and obtain protection against pursuing creditors, who may be enjoined from pursuing their ordinary remedies, is without foundation. We cannot account for the mistake fallen into in the proceeding of December 22, 1891, and all that was done under it, except by supposing that what is provided for by statute in other states was considered admissible in the absence of statute in this state. The suit of Hanover Bank *et al.* v. Bank of Greenville, instituted July 11, 1892, is evidence of the fact

that it was considered necessary to strengthen the grasp of the Chancery Court on the assets of the bank, and that it was a timely proceeding for the purpose of the complainants in that suit, for it results from what we have said, that all that went before was of no legal validity; and, but for that suit, there would have been no barrier to his proper proceeding by any creditor, the injunction issued to the contrary notwithstanding. But if the court was not wholly without jurisdiction in that suit, it was inadmissible to inject into it other suits, as sought to be done by the bill of July 23, 1892, and that of February 6, 1893.

The question, then, is as to the case of *Hanover Bank et al. v. Bank of Greenville*, begun by original bill July 11, 1892. Was the action of the court as to that case void? It is to be observed that the bill in that case is not one to secure any priority or advantage to the complainant in it, to the injury of other creditors, but it is for all creditors of the Bank of Greenville, as shown by its prayer for the appointment of a receiver to preserve and collect the assets and distribute the money among all the creditors, according to their rights as ascertained. There was no time when Whitney could not join in this suit as a complainant, or assert his right of priority as claimed, if he had chosen to do so; but his persistent effort was to obtain priority over other creditors and secure full payment if the assets were sufficient; and he was unwilling to make common cause with all creditors, but, asserting the voidness of all the proceedings in the Chancery Court as to these matters, he sought, as he had a right to do, to obtain precedence as a creditor by getting judgment against the bank and enforcing it. He got judgment, and if that entitled him to be paid out of the bank's assets in the hands of the receiver, he might have propounded his claim of priority in the Chancery Court, and demanded its recognition and payment by an order therefor, but he maintained his attitude of asserting the nullity of all the proceedings in this matter of the Chancery Court,

and attacked them as void ; and the maintenance of his bill of February 6, 1893, depends on maintaining the legal proposition on which it rests. His learned counsel has been not only persistent, but consistent, in the many methods employed to obtain for his client an advantage over other creditors. It remains to be stated whether or not he shall succeed in securing the reward of his industry in behalf of his client. By his bill of February 6, 1893, he has pursued the proper course to obtain an adjudication of the question on which the claim made by his client depends. This bill attacks the validity of the proceedings in the Chancery Court in the case of *Hanover Bank et al. v. Bank of Greenville*, on the ground that it is not the province of a court of chancery to dissolve a corporation, or interfere with the exercise of its franchise, or displace its officers, or appoint a receiver, or otherwise exercise jurisdiction over it, at the instance of creditors who have no judgment against it. In this case there was no interference by the court with the bank or its franchise and the performance of the ordinary functions of its officers. There was no attempt to dissolve or restrain the corporation. Its directors had voluntarily surrendered its assets to the keeping of the chancellor, and ceased to perform their duties as to them. The chancellor had accepted the trust, and designated a receiver to take charge of these assets and care for them, and had enjoined all creditors of the bank from suing it, and had proceeded in the administration of the trust he had accepted as if there had been a creditors' bill ; and, although this fell little short of being a mere farce, saved from it only by the seriousness of the performance with judicial gravity in good faith, it was, nevertheless, the condition in which the complaining creditors found the affairs of their debtor on July 11, 1892, when they instituted their suit representing the deplorable conditions existing, and prayed the interference of the Chancery Court to take charge of the assets of their debtor, the bank, thus abandoned by it, and

surrendered to the chancellor, who, though without authority to receive them, had yet taken control of them as if he did have the right to receive them, and had been dealing with them accordingly. The bill urged the necessity for the immediate appointment of a receiver for the preservation of the assets of the bank, which had suspended, and ceased to care for them since December 22, 1891. It is true that none of the complainants was a judgment creditor of the bank, and none had a specific lien on the assets of the bank. Yet these assets constituted a trust fund, in a general sense, for the payment of the creditors of the bank, and, having been abandoned by the managers of that corporation and transferred to the chancellor, who was dealing with them as of right, when he had no more legal authority over them than a private individual who might have found them, if it may be said that, under these circumstances, it was erroneous for the chancellor to entertain the suit of general creditors of the bank and appoint a receiver, it certainly cannot be maintained that this proceeding was wholly unauthorized and void, so as to be subject to collateral attack for want of jurisdiction to entertain the suit: *Vanfleet, Collat. Attack*, § 100; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781; *Graham v. Railroad Co.*, 102 U. S. 148; *Goodman v. Winter*, 64 Ala. 410; *Barbour v. Bank*, 45 Ohio St. 133, 12 N. E. 5; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293.

Many other books might be referred to in support of the proposition asserted, but, if the doctrine announced did not prevail elsewhere, there can be no doubt as to the law here since the Constitution of 1890. By § 160 of that instrument, "in all cases where said court [chancery] heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law." This is in harmony with the scheme of the Constitution reversing the

former relations of the courts, in which the Circuit Court possessed general jurisdiction, and was the repository of the power to administer legal remedies, and the Chancery Court had jurisdiction of certain designated matters, and where there was not a full, adequate and complete remedy at law. Now the Circuit Court has original jurisdiction "in all matters, civil and criminal, in this state not vested by this Constitution in some other court:" Section 156. A residuary grant is thus made to the Circuit Court. This manifests the policy of enlarging the domain of chancery and limiting that of the court of law. What may be the effect of the provisions mentioned in widening the scope of the Courts of Chancery cannot be determined now, and is not necessary to be decided; but that they will be influential in considering the class of cases in which Chancery Courts may entertain jurisdiction is undeniable. When we look to § 147 of the Constitution, all doubt as to the proper resolution of the question presented by this case vanishes. Because of that section, error is not predicable of "any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction." "No judgment or decree in any Chancery or Circuit Court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction," is the mandate of the fundamental law, and sweeps away all distinction between equity and common-law jurisdiction after it has been entertained in a civil cause in the Chancery or Circuit Courts. It may be an action of crim. con., or for libel or slander, or trespass, or any other civil cause in the Chancery Court, or an equity matter in a court of law; if entertained there error is not predicable, and the decree or judgment shall not be annulled for want of jurisdiction. The chancellor or circuit judge conclusively and finally settles the question of jurisdiction, as be-

tween equity or common-law jurisdiction, of the particular case; for it would be the height of absurdity to hold that, while error may not be affirmed of it, such judgment or decree is void. The reason we do not apply the provisions of the Constitution mentioned to the matter of December 22, 1891, and uphold it, and what followed, is that it was not a cause. There was no suit or action, and no parties plaintiff and defendant, but a mere *ex parte* surrender by the bank to the chancellor of its affairs, for which there is no authority in law, and, therefore, the Constitution does not apply, but relates to a civil cause, as properly understood, and not to all that a chancellor or judge may do. The case of *Hanover National Bank et al. v. Bank of Greenville* is a suit regularly begun by bill against a defendant, and regularly proceeded with to a final decree; and, while we will not be understood to hold that there was even error in the action of the chancellor—which question is not before us for decision—we are sure his action cannot be held void or annulled, and that disposes of cases Nos. 7,749 and 7,460.

The decree allowing \$2,000 for damages in the way of attorney's fees is complained of, but as the evidence on which the chancellor decided this sum to be reasonable was not put in the record, and is not before us, we cannot disturb the decree for this. The result is that the decree in each of the three cases hereinbefore mentioned must be affirmed.

In the absence of a statute permitting it, no person can be made a defendant in an equity suit on his own application and against the will of the complainant: *Shields v. Barrow*, 17 How. 145; *Coleman v. Martin*, 6 Blatchf. 118; *Drake v. Goodridge*, 1b. 151; *Harrison v. Morton*, 4 Hen. & M. 483. In *Read v. Long*, 4 Yerg. 71, parties were made defendants against the objection of the complainant, but this matter was not passed upon by the Supreme Court, and in *Stevenson & May v. Nashville &*

Northwestern R. R. Co., cited 2 Tenn. Ch. 143, the chancellor held that complainants could not, as a general rule, be compelled to litigate against their wishes with persons not selected by themselves as defendants, and that a person could not intervene as defendant on his motion alone, is decided in *Stretch v. Stretch*, 2 Tenn. Ch. 140.

Ecclesiastical law—Religious societies—Division in religious body—Right to church property.

KRECKER v. SHIREY.

(Supreme Court of Pennsylvania, October 1, 1894.)

[Reported 35 Weekly Notes of Cases, 165 ; 163 Pennsylvania, 534.]

The organization of a denominational body or church involves the adoption of both a creed and an ecclesiastical polity ; abandonment or repudiation of either constitutes secession from the body holding said creed or polity.

Where the constitution of a church provides for the fixing of a place of meeting from time to time by a certain body, the act of fixing the meeting is a matter of administration and not of legislation, and the power to perform said act may be delegated.

The title to the corporate property of a congregation which is divided is in that part of the congregation which is in harmony with the laws, usages and customs as accepted by the body before the division took place and which adheres to the regular organization.

A congregation connected with a denomination must submit to the system of discipline peculiar to the body with which it is connected, irrespective of the views of the majority of the congregation itself.

Upon questions of discipline, as well as of faith, the decisions of the ecclesiastical courts are ordinarily final, and will be respected and enforced by courts of law.

The Discipline of the Evangelical Association of North America provided that a general conference should meet once every four years, and that each said conference should fix the place of meeting of the next conference, but, should it fail to do so, the oldest of the annual confer-

ences (subordinate bodies) should fix the place. The conference of 1887 adjourned after referring the question of the next place of meeting to the Board of Publication, a corporation connected with the association. The board appointed I. as the place of meeting for 1891. The oldest annual conference, that of E., then appointed P. as the place of meeting. A large body assembled at I., a smaller one at P., in 1891. In December, 1889, B., the bishop within whose jurisdiction was the annual conference of E., was suspended by a trial conference which, under the laws of the association, had power of suspension until the whole matter should be passed upon by the general conference. In February, 1891, a majority of the members of the annual conference of E. met at the appointed place and refused to allow B. to take part in the meeting. B. and some members who adhered to him met in another place. The majority body assigned one S. as pastor of a certain church at R. connected with the body within the conference. The B. body assigned to the same place one K. In October, 1891, the conference meeting at I. recognized the proceedings of the B. body as those of the regular annual conference, while the body meeting at P. recognized the meeting from which B. had been excluded. In the meantime S. had been admitted to and K. excluded from the R. church. On a bill being filed by K. and his adherents, *held*,

1. The general conference which met at I. in 1891 was the regular successor of that of 1887, and was the general conference of the Evangelical Association; and the annual conferences, congregations and church members adhering to it constituted the Evangelical Association, while the adherents of the P. body had become by their own act a hostile and independent organization.

2. The property which, prior to 1891, belonged to the Evangelical Association belonged after that time to those who still constituted the association.

3. The assignment of K. to the R. church was made by a provisional body of adherents without ecclesiastical authority, and gave him no title; but the subsequent ratification of the assignment by the general conference gave him a title good from that date.

4. The assignment of S. was by an illegally organized body, and gave him no title, notwithstanding his reception by the majority of the members and officers of R. church.

Appeal of Augustus Kreckler and others, plaintiffs, from the decree of the Common Pleas of Berks county, in a suit in equity brought by them against Jonas H. Shirey and others.

The bill in this case set up the existence for over ninety years of an incorporated religious association known

as the Evangelical Association of North America, governed by a fundamental law known as the Discipline; that by the said Discipline the countries in which the said association existed was divided into twenty-five annual conference districts; that said conferences were deliberative bodies meeting annually, composed of all the itinerant preachers of the denomination and those who had traveled and by ordination stood in full connection with the ministry of the association, each of the said conferences comprising many organized churches, some of which were incorporated, and all of the said conferences were subordinate to the general conference; that under the fundamental law or discipline there was a quadrennial conference of the whole association, composed of one member for every fourteen or a surplus of more than seven members of each annual conference, who were elected from among the elders by a majority of members of the said annual conference, and also certain officers of the association, including the bishops, the said quadrennial conference being known as the general conference and constituted by the fundamental law "The Supreme Court of Law in the Church;" that the ministers of the said association were divided into orders of bishops, elders and deacons, the members of which orders must possess certain qualifications and have certain duties to perform; that the "Immanuel Church of the Evangelical Association of the City of Reading, in the County of Berks," composed of members of the said religious association, was a corporation, the charter whereof provided for the election of seven trustees, in whom the estate of the church was vested, and provided that the corporation should be subject to the fundamental law or discipline; that by deed dated May 31, 1884, a certain property, being the property in question, was conveyed to the officers of the said corporation "in trust, to be kept, used and maintained as a place of divine worship by the ministry and membership of the Evangelical Association of North America, with power to dispose of and convey the

same, subject to the discipline, usage and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference of said association and the annual conference in whose bounds the said premises are situate ;" that the said church was situate in the East Pennsylvania conference, which, during the year 1891, was under the charge of Thomas Bowman, a duly elected bishop of the said association ; that, under the fundamental law and discipline, the bishop, at the annual conference, and the presiding elders, should, at a meeting of the conference, assigned the preachers their respective fields of labor, and that at the meeting of the East Pennsylvania conference, held in March, 1891, the said Thomas Bowman, bishop, and the presiding elders, assigned Augustus Krecker, one of the plaintiffs, to the said church, to which church he had been duly assigned for the preceding year, and in which, at the time of his reassignment, he was lawfully exercising the rights of pastor ; that, upon the reassignment of the said Augustus Krecker, the defendants, with many others, conspired together for the purpose of preventing him from acting as pastor of the said church, and procured a majority of the trustees to adopt a resolution excluding him, and providing that Jonas H. Shirey, one of the defendants, should be recognized as pastor, and on the 8th day of March, 1891, actually and forcibly prevented the said Augustus Krecker from going into the pulpit ; that, on the 1st day of October, 1891, the general conference of the said association met at the city of Indianapolis in regular and stated quadrennial sessions, and the matter being brought before the said general conference and regularly examined, it was adjudged and decided that the assignment of the said Augustus Krecker to said church was regular, and was the only regular and valid assignment ; that, on the 13th day of November, 1891, after the decision of the general conference, the said Augustus Krecker notified the said Jonas H. Shirey and the other defendants

of the said decision, and demanded admission to the said church, which was refused.

The bill prayed :

First. An injunction restraining the defendants from excluding the said Augustus Kreckler from the exercise of his rights as pastor.

Second. That the defendants might be enjoined from time to time to admit to the pastoral rights of the said church whomsoever the bishop elected by the general conference, who, with the assistance of the presiding elders and in accordance with the discipline, assigned to the said church.

Third. That the trustees who passed the revolutionary resolution aforesaid might be deposed, and an election to fill the vacancies thus created be ordered.

Fourth. General relief.

The defendants in their answer admitted the existence of the religious association, as stated in the bill, but denied that it was similar to that of the Episcopal form of church government, and averred that by the discipline the powers of the bishops were restricted, and that they had only such powers as were conferred by the discipline, and declared that each local society was in subordination to the general organization only to the extent expressly determined by the discipline. They admitted that the association was, under the fundamental law, divided into annual conference districts, as alleged, but denied that the annual conferences were subordinate to the general conference to such extent as to make the control of the latter over the former absolute. They declared that the general conference possessed only the authority given to it by the discipline. They admitted that the general conference was constituted as averred in the bill, but declared that its powers were limited in the discipline to decide upon the legality of acts of annual conferences, and such as might arise between any incorporated society and its officers or any annual conference, and that it

had no power to decide except in such cases as were lawfully brought before it. They admitted that the ministers of the association were divided into orders, as alleged in the bill, but they denied that there was in the church an order of bishops, and declared that the bishop held a mere office, not being ordained, as deacons and elders are. They admitted the organization of Immanuel's Church, as alleged in the bill, but denied that it was a corporation, the charter and decree not having been recorded. They admitted the conveyance of the church property to trustees in trust for the ministry and membership of the association. They admitted that the church property was situated in the East Pennsylvania conference district, as alleged, and that Thomas Bowman had been bishop, but denied that the East Pennsylvania conference was, during any part of the year 1891, in charge of the said Thomas Bowman. They declared that he had been previously tried in accordance with the discipline, and, on the 7th of March, 1881, found guilty of immoral conduct and suspended; and they set out in detail the proceedings which ended in his suspension. They denied that, under the discipline, the bishop and the presiding elders should assign the preachers, but declared that it was the president and presiding elders of the annual conference who should make the assignments, and they declared that at the meeting of the East Pennsylvania conference, held in February, 1891, the said Jonas H. Shirey, one of the defendants, was assigned to the Immanuel Church; that at the regular annual session of the said conference for the year 1891, there being no bishop present, the said Thomas Bowman having been so suspended, the said conference elected Presiding Elder C. S. Haman as president; that twenty-one members of the said conference, including the said Augustus Kreckler, seceded therefrom, and, with the said Thomas Bowman as presiding officer, held a pretended conference, at which there was not one presiding elder; that the said regular annual conference transacted

the business and functions belonging to it, and that, in accordance with the discipline, the president thereof and the presiding elders assigned the preachers their respective fields of labor, and assigned the said Jonas H. Shirey to the pastorate of Immanuel's Church aforesaid. They denied that the assembly presided over by the said Thomas Bowman was the regular East Pennsylvania conference. They declared that they had no information otherwise than from the bill of the pretended appointment, by the said Thomas Bowman, of Augustus Kreckler to the said church, and averred that such assignment, if made, was illegal.

They admitted that they excluded the said Augustus Kreckler from the said church. They alleged that about two-thirds of the members of said Immanuel's Church, and a majority of the trustees adhered to the conference at which the said Jonas H. Shirey, was appointed, and repudiated that at which the said Augustus Kreckler was appointed, and that the exclusion of the latter was in accordance with the discipline and the provisions of the said deed of conveyance.

They denied that the conference held at Indianapolis was the legal conference of the association, but averred that the legal conference was held at Philadelphia, on October 1, 1891, at which general conference the assignment of Jonas H. Shirey to the said church was adjudged valid; that under the discipline it was provided that the time and place for meeting of the general conference should be appointed by the bishops, with the consent of the majority of the conference; that if no bishop were present the general conference should do it by a majority of votes, or the oldest annual conference; that at the meeting of the general conference in 1887, the bishops and the majority of the conference appointed the time, but left the selection of a place to the Board of Publication; and averred that the general conference had no right to delegate the appointment of a place to such board, because, under the discipline, upon the failure of the con-

ference to appoint it, the appointment devolves upon the oldest annual conference; that the East Pennsylvania conference as such oldest annual conference, on the 26th day of February, 1891, fixed Philadelphia as the place for the meeting of the general conference, of which fact a notice was sent to all the conferences except the Texas conference, whose meeting had already been held, but a notice was sent to the delegates elected by that conference to the general conference; that the general conference convened in Philadelphia and confirmed the trial and sentence of Thomas Bowman. They denied that the general conference had any jurisdiction over the appointment of preachers. They admitted that, on the 13th of November, 1891, Jonas H. Shirey and the other defendants were notified of the decision of the Indianapolis conference, and that they disregarded the same, as averred in the bill.

They averred that they and those with whom they are associated had for a long period formed the religious society known as the Evangelical Association of North America, governed in accordance with the Book of Discipline; that some years since the plaintiffs and those with whom they adhere attempted fundamentally to change the system of government of the said association; that the defendants and those with whom they were united constituting an overwhelming majority of the East Pennsylvania conference and seven other annual conferences and a numerous minority of all the other American conferences opposed those efforts, whereupon the plaintiffs and their associates formed among themselves a religious association under the system of government which they had attempted to force upon the Evangelical Association of North America, and aided by J. J. Esher and Thomas Bowman, falsely claiming to act as bishops when in fact they had been suspended, caused to be held a general conference of the new association at Indianapolis; that they procured a majority of the members of certain annual conferences to accept this new organization

and send delegates to Indianapolis; that by arbitrary suspension on the part of one of the pretended bishops of a sufficient number of ministers, they procured an apparent majority of said conferences to adhere to them, and having procured an apparent majority of the annual conferences except those mentioned in the answer, caused conferences to be called within the limits of the said excepted annual conferences, saving only Pittsburg and Central Pennsylvania conferences; that the said conferences so created elected delegates to the Indianapolis conference which, by resolution, pretended to expel from the Evangelical Association all members who refused to send delegates to the new organization, and that said conduct was illegal.

The matter was referred to Louis Richards, Esq., as examiner and master, who, after finding the facts, which sufficiently appear by the opinion of the Supreme Court, reported the following conclusions of law: (1) The trial of Bishop Bowman by the trial conference in 1890 was legal, and the sentence of suspension pronounced on him operative until the matter was disposed of by the succeeding general conference. (2) The previous examination of Bishop Bowman by three elders was wholly invalid as a disciplinary proceeding, and even if regularly conducted could constitute no bar to a subsequent examination and trial upon the same charges. (3) The East Pennsylvania annual conference of 1891, presided over by the Rev. C. S. Haman, was the only lawful and regular East Pennsylvania conference, and its ministerial appointments were regular and valid, and therefore Jonas R. Shirey was the only lawfully appointed minister of the Immanuel Church, Reading, for the conference year. (4) The action of the defendants in excluding Augustus Kreckler from the charge of the church was lawful and justifiable. (5) The assemblage in Indianapolis in October, 1891, was not the lawful general conference of the Evangelical Association, because the place for holding the same was not fixed in accordance with the pro-

visions of the discipline, which were to the effect that if not fixed by the general conference it should be by the oldest annual conference, the master holding that the general conference had no right to delegate the power of selection to the Board of Publication, by which, in fact, the place of meeting had been determined. (6) The assemblage at Philadelphia in October, 1891, was not a lawful conference because there was not then present a constitutional quorum as fixed by the discipline. (7) If the Indianapolis assemblage was the lawful general conference its judgment upon the matter of Bishop Bowman was invalid because rendered in its legislative capacity and not as the Supreme Court of the Church, in accordance with the requirements of the discipline and of common law, equally invalid was its action in affirming the appointments of the minority East Pennsylvania annual conference presided over by Bowman, who had been legally suspended until the next general conference, "which shall then determine the whole matter:" § 125 of the discipline; and whereas § 75 of the discipline required all appeals to be tried by a committee of nine, the conference had simply declared that there were no charges against Bishop Bowman, and adopted the report of a committee of fifteen which, apparently without evidence before it, or the presentation of the case of the accusers, confirmed the views of the bishop in every particular. (8) That the trust under which the property in question was held was valid, and that the trustees or lay members of the church were not authorized by the Act of April 26, 1855, to decide whether any particular preacher assigned to the pastorate charge should be received or rejected by the congregation. The master recommended a decree dismissing the bill at the costs of the plaintiffs. Exceptions were filed by both sides. The decree recommended was adopted by the court in an opinion delivered by ENDLICH, J.

The plaintiffs took this appeal and filed forty-one assignments of error, the material effect of which sufficiently ap-

pears by the arguments and the opinion of the Supreme Court.

Cyrus G. Derr and Edward Harvey (with them *Augustus S. Sassaman, Ritchie and Esher*), for appellants.—The conference of 1887 had power to refer to the Board of Publication the selection of the place for the session of 1891: *State v. Esher*, 6 Ohio Cir. Ct. Rep. 312; *Auracher v. Yerger*, 25 Chic. Leg. N. 197; *Schweicker v. Husser*, 44 Ill. App. 566; 146 Ill. 399.

The act of selection was not one of a distinctively legislative character, and hence could be performed by deputy, and even if regarded as legislative it was of a class in which legislative action may be performed by subordinate agencies. The discipline is a constitution, and as such is not to receive a technical construction like a common-law instrument or a statute, and its commands as to the time or manner of performing an act are to be treated as merely directory, whenever it is not said that the act shall be performed at the time and in the manner prescribed and no other: *Com'th v. Clark*, 7 W. & S. 133; *Schlichter v. Keiter*, 156 Pa. 119; *Miller v. State*, 3 Ohio, 476; *Kilgore v. Magee*, 4 Norris, 401; *Huston v. Clark*, 112 Ill. 344; *Bladen v. Phila.*, 60 Pa. 464; *Pittsburg v. Coursin*, 74 Ib. 400.

The action of the conference of 1887 was a construction of its own disciplinary powers in a manner and upon a matter that is conclusive of the civil courts. The place of meeting is purely an ecclesiastical matter over which the association, through its lawfully constituted authorities, has supreme control; it concerns the association only, and, as a matter of internal polity upon such subject, the decisions of church tribunals are final: *Schweicker v. Husser*, *supra*; *Schlichter v. Keiter*, *supra*; *Watson v. Jones*, 13 Wall. 679; *Smith v. Swormstedt*, 16 How. 308.

The action of the Board of Publication in fixing the place was lawful, and even if the act were participated in

- by Bowman and Esher, during a valid suspension, that would not invalidate the act, which was that of *de facto* if not *de jure* officers and cannot be impeached collaterally, or ignored, public interests depending on its validity: *Scadding v. Lorant*, 5 E. L. & Eq. 16.

The mere suspension of the bishops did not oust them from membership of the Board of Publication; that board was an Ohio corporation, ouster could be pronounced only upon *quo warranto* proceedings by the state of Ohio: *Doremus v. Dutch Ref. Ch.*, 3 N. J. Eq. 332; *Sampsel v. Esher*, 26 Week. L. Bul. 162.

A court of equity cannot inquire collaterally into the validity of tenure of office of a member of a foreign corporation: *In re Sawyer*, 124 U. S. 200; *Hagner v. Heyberger*, 7 W. & S. 104.

The decision of the Indianapolis conference upon the suspension of the bishops is final and binding upon the civil courts. That being the case, the annual conference, presided over by Bowman was authorized to appoint the plaintiff Kreckler, and he, having been appointed, could not be lawfully excluded by a majority of the congregation, notwithstanding the Act of April 26, 1855: *Appeal of First Meth. Prot. Church*, 16 Weekly Notes, 245.

George T. Baer and Jefferson Snyder, for appellees.—The body presided over by Haman was the legal annual conference of East Pennsylvania and not that presided over by Bowman. The discipline fixed no number for a quorum, the general rule therefore applies in that a majority of all members present in obedience to the call constitute a quorum: *St. Mary's Church Case*, 7 S. & R. 517; *Craig v. First Presby. Church*, 88 Pa. 42; *Com'th v. Green*, 4 Whart. 598; *Pres. Cong. v. Johnston*, 1 W. & S. 38.

The action of the Indianapolis conference, assuming it to be the legal one, did not constitute the Bowman body a lawful annual conference. The decree of a church judicatory

is binding only when it is affirmatively shown that it has acted within the scope of its authority, and has observed its own organic rules: Kerr's Appeal, 89 Pa. 112; McGinnis v. Watson, 41 Ib. 14; Sutter v. Trustees, 42 Ib. 512; McAuley's Appeal, 77 Ib. 397.

And the proceedings may be inquired into and examined, to see if they have been kept within proper bounds and proceeded with duly according to rule: Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 467; Kilbourn v. Thompson, 103 U. S. 168; Schlichter v. Keiter, 156 Pa. 137.

Here the Indianapolis conference did not proceed regularly to overrule the trial conference as to the suspension of the bishops, and the general conference has no authority to declare the Bowman body the legal annual conference. It can declare judgment "only in such cases as are lawfully brought before it for adjudication:" § 74 of the discipline. Its proceeding was not, therefore, judicial, but if regarded as judicial, its action in excising the annual conference of East Pennsylvania was illegal, the excised persons not having been given a hearing: Hoffman's Eccl. Law, 276; Com'th v. Green, *supra*; O'Hara v. Stack, 90 Pa. 490; McAuley's Appeal, 77 Ib. 397; Kerr's Appeal, 89 Ib. 97; Jones v. State, 44 N. W. Rep. 658; Smith v. Nelson, 18 Vt. 202.

The Indianapolis body was not the legal general conference, owing to the invalidity of its call. The general conference of 1887 had no right to delegate to the Board of Publication the power to select a place of meeting. With the adjournment *sine die* the power of the conference of 1891 died, and hence the power of its delegate, as the conference could not delegate a power to survive its own. Besides this, the conference itself has but a delegated power, and *delegatus non potest delegari*. This is not a case in which the delegation of the right to appoint can be sustained on the ground of necessity, for the discipline itself provided for

an agency to appoint, should the conference fail to fulfill its duty in that respect: *Hawley v. James*, 5 Paige, 318; *In re Speight*, 22 Ch. Div. 727.

The trust in the deed to the Immanuel Church is void. The title to the property is vested in the Pennsylvania corporation. The effect of the trust, which is without consideration if sustained, would be to turn over the control of the property to a general denomination, composed partly of foreigners; in other words, to transfer to persons not citizens of this commonwealth the control and use of the property of a corporate society, whose membership is limited, by the Act of 1840, to citizens of this commonwealth. This cannot be done under the laws of Pennsylvania: *Methodist Ch. v. Remington*, 1 Watts, 218; *Price v. Maxwell*, 28 Pa. 35; Act of April 26, 1855, P. L. 329.

The majority of a congregation must be permitted to determine for themselves where they will go when a denomination divides on matters not relating to faith or worship: *Trustees of Lutheran Cong. v. St. Michael's Ch.*, 48 Pa. 20; *Methodist Ch. v. Remington*, *supra*; *Presby. Cong. v. Johnston*, 1 W. & S. 40.

WILLIAMS, J.—The legal questions involved in this case are interesting and important, but they are no longer open in this state. The labor which it has been necessary to expend upon the case in the court below and in this court has been over the facts, and the inferences that ought to be drawn from them. This labor is made no less burdensome by the character of the facts to be passed upon. The conduct of the parties and their sympathizers on both sides seems to have been hasty, uncharitable and ill-tempered. It affords a travesty, rather than an illustration, of the precepts of the religion of peace, for the support and diffusion of which the church was organized, and the parties on both sides profess to have devoted their energies and their lives. But our concern is with the legal aspects of

the case presented to us, and to them we turn, leaving the moral side of the controversy to the consciences of the combatants.

The Evangelical Association of North America is a religious body that had its origin early in the present century. Its history presents a rapid growth and a career of usefulness. Its statistics for the year 1891 showed a membership of about one hundred and fifty thousand. These were gathered into more than two thousand churches, and under the pastoral care of about twelve hundred and fifty preachers. Its ecclesiastical organization rests on the individual church or congregation. A convenient number of these form a quarterly conference, the sessions of which are presided over by a presiding elder. Several quarterly conferences grouped together by the action of the general conference, form an annual conference, of which there were twenty-five in existence in 1891. The annual conferences elect delegates, according to a ratio previously fixed upon, to represent them in the general conference which meets once in four years, and which is the highest body legislative and judicial in the denomination.

The bishops, of whom there were three in 1891, and certain executive officers, are *ex officio* members of the general conference. The powers of this body are defined by the Book of Discipline. Paragraph 74, page 57, declares it to be "the supreme court of law in the church." It has appellate jurisdiction of cases heard in the lower church tribunals, and original jurisdiction over all controversies to which the annual conferences are parties, or that affect the legality or regularity of their action. It has jurisdiction over the bishops to try, suspend, depose and expel them.

Paragraph 73, page 56, declares it to be the supreme legislative body in the church, subject, however, to two limitations upon its power. It cannot disturb the articles of faith. It cannot abandon the itineracy or change the forms of church discipline. It also possesses general administrative powers which are recognized in several paragraphs of the

Book of Discipline, among which are Nos. 72, 73, 76 and 93. It fixes the number of bishops needed, elects them and directs and supervises their work. It organizes and fixes the boundaries and names of the annual conferences. It conducts through boards and committees the publication and missionary enterprises of the denomination.

In 1887, this denominational body, with all its religious and ecclesiastical machinery, was in harmonious and successful operation. Its general conference was in session in Buffalo, N. Y., and the several annual conferences were represented therein. In 1891, there were two bodies in session at the same time, in different portions of the country, each claiming to be the general conference of the Evangelical Association. Each elected bishops and claimed jurisdiction over the annual conferences and the publication and missionary boards of the church. The litigants in this case are adherents of these rival bodies, the plaintiff claiming title under one of them, and the defendants under the other. The first and the controlling question in this case is thus seen to be one of ecclesiastical identity. Which of these contesting bodies is the general conference of the Evangelical Association? The next question is, which of the parties now before us adheres to, and derives title under, the body found to be the general conference? Now it must be borne in mind that the organization of a denominational body or church involves the adoption of a religious creed and an ecclesiastical polity. Adherence to a particular body requires therefore adherence to both the creed and the polity. To abandon or to repudiate either is to abandon or secede from the body whose authority is thus disregarded.

In this case both parties claim to adhere to the creed of the Evangelical Association, and it seems to be conceded that no question of religious belief enters into the controversy.

The points of difference arose under the polity of the church, and rested on conflicting interpretations of pro-

visions of the Book of Discipline. The first of these was over the meaning of paragraph 71, page 56, which provides for fixing the time and place of meeting of the general conference.

This paragraph empowers the bishops in attendance upon the general conference to name the time and place for the next meeting of the body, subject to the approval or disapproval of the body itself. If the first suggestion of the bishops is not approved they should make and submit another, and so on until an agreement is arrived at. If the bishops are not present the general conference proceeds to fix the time and place in the first instance. If for any reason the time and place are not fixed in either of these ways and the conference adjourns without action on the subject, then the duty falls upon the oldest conference, and must be discharged, and the necessary notices given to the other conferences, so as to prevent a failure of the session of general conference during the proper year.

The questions raised upon this paragraph were: First. What is the nature of the duty imposed by it? Is it legislative or administrative? Second. If administrative, what shall amount to a conference?

The laws of the church provided for a meeting of the general conference once in four years; but they did not, because they could not, fix in advance the particular day and place at which these quadrennial meetings should be held. But the laws could and did make provision for the fixing of both time and place, by naming the instrumentalities by which these details should be settled from time to time as the circumstances then existing might seem to require. It devolved the duty of naming the time and place first on the bishops and the general conference. Next on the general conference alone. Lastly, in case neither of these instrumentalities discharged it, on the oldest annual conference. The act had the same character by whichever of these bodies it was performed. It was a settlement of a matter of detail necessary to the

administration of the polity or ecclesiastical system of the church. It was, therefore, an act of administration, not of legislation. The general rule is that the power to perform such acts may be delegated, and that the acts, when properly done by the appointee, are valid as the acts of the principal. We proceed therefore to inquire what the Board of Publication did under the authority given it by the bishops and the general conference of 1887. It appears that a usage exists in this denomination that prevails in most, if not all, religious bodies. It is to receive invitations from towns and churches willing to entertain the body, and then select from the list of places offered that which is most desirable. In 1887, when this order of business was reached, the general conference had no offer of entertainment before it. It seemed best under the circumstances to the bishops and to the conference, to authorize the Board of Publication to receive offers of entertainment after the adjournment, and to correspond with the annual conferences upon the subject; and, after full consideration, to decide upon the place for the next session. This board was one of the permanent executive agencies of the church. It included all the bishops in its membership, and eight other persons, each of whom was selected from one of the eight districts into which the whole church was divided for this purpose. After considerable inquiry and correspondence this board named Indianapolis as the place, and gave notice of this fact to the annual conferences. This was a complete discharge of the duty imposed upon the Board of Publication. It fixed definitely the place for the holding of the next general conference with the same effect as though the place had been named by the conference itself, and it afforded ample opportunity to all the annual conferences to be represented therein.

Several months later the annual conference of East Pennsylvania met in Ebenezer Church in the city of Allentown. Without pausing to inquire into the regularity of its organization or its power under the Book of Discipline to perform

the proper work of the annual conference, but treating this body as being what it claimed to be, we will consider its action. It was a subordinate tribunal whose judgments were removable by appeal to the general conference, but it assumed the right to review and sit in judgment upon the action of its superior. It pronounced the action of the general conference of 1887, in relation to the place of its next meeting, to be a violation of the discipline, and therefore absolutely null and void. It then proceeded as the oldest annual conference to fix upon Philadelphia as the place, and gave notice of its action to the several annual conferences.

This action was unnecessary. The time and place had been fixed by, or under the authority of, the general conference. The annual conference had been notified in ample time to enable them to arrange for the attendance of their delegates. The place had not been objected to as unsuitable or inconvenient. If the delegation of the power to fix the place to the Board of Publication had been questionable, it had been unanimously acquiesced in at the time it was made, and, under the circumstances, seemed the only practicable thing to do. It worked no injury to the ecclesiastical body and affected injuriously no interest or enterprise of the church.

But this action was not only unnecessary, it was disrespectful, irregular and insubordinate. It put the judgment of the annual conference of East Pennsylvania against that of the supreme judicatory of the denomination upon a question affecting the construction of certain provisions in the discipline. It not only overruled its ecclesiastical superior but it proceeded to act upon its own interpretation of the discipline in opposition to the action of its superior; and to call upon the other annual conferences to accept its decision and reject that of the supreme court of law of the church upon the same subject.

This was not revolution within, but rebellion against, the

ecclesiastical organization. Most of the annual conferences seem to have regarded the subject in this light, for eighteen of them sent undivided delegations to Indianapolis while but two sent undivided delegations to Philadelphia. The remaining five were divided in opinion, and sent delegates to each place. The general conference meeting in Indianapolis had not only a quorum, but a decided majority of all the delegates to which the annual conferences were entitled. It had also the two acting bishops and the other *ex officio* members of the body.

The alleged general conference that met in Philadelphia did not have a quorum of those entitled to sit in general conference, and, as the master has well found, was incompetent under the Book of Discipline to transact business. It nevertheless assumed to set aside the authority of the body that met in Indianapolis and to exercise the powers and functions of a lawful general conference. In fact, it claimed to be the lawful successor of the general conference of 1887 and the supreme authority in the church.

This, as we have said, was an open revolt. The churches and conferences that participated in it have from that time kept up an independent organization, and refused obedience to the conference that represented the majority and maintained the ecclesiastical organization of the denomination. The result has been a divided body, and, what is more to be regretted, divided local congregations, creating discord, litigation and personal bitterness throughout the East Pennsylvania and several other annual conferences in which the Philadelphia general conference had its supporters. It follows necessarily that those who adhere to the Indianapolis general conference constitute the Evangelical Association. Those that adhere to the hostile body that met in Philadelphia are by their own acts put on the outside of the ecclesiastical organization, and must remain there until they recognize once more the authority of the body from which they have separated : Winebrenner *et al.* v. Calder *et al.*, 43

Pa. 244; *Kerr v. Trego*, 47 Ib. 292; *Roshi's Appeal*, 69 Ib. 462. The title to the church property of a congregation that is divided is in that part of the congregation that is in harmony with its own laws, usages and customs as accepted by the body before the division took place, and who adhere to the regular organization: *McGinnis v. Watson et al.*, 41 Pa. 9; *McAuley's Appeal*, 77 Ib. 397; *Bandis's Appeal*, 102 Ib. 467.

It does not matter that a majority of any given congregation or annual conference is with those who dissent. The power of the majority as well as that of the minority is bound by the discipline, and so are all the tribunals of the church from the lowest to the highest: *McAuley's Appeal*, 77 Pa. 397; *Sutter et al. v. The Reformed Dutch Church*, 42 Ib. 512; *Stack v. O'Hara*, 90 Ib. 477; *Schlichter et al. v. Keiter et al.*, 156 Ib. 119. The laws of the ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the Constitution and laws of the state. A sufficient reason for this is that they have been made or assented to by the parties who have agreed with each other by the act of uniting with the body to be governed by its laws and usages: *Tuigg v. Tracy*, 104 Pa. 493. An independent congregation may be governed by the majority of its own membership, but a congregation connected with any given denomination must submit to the system of discipline peculiar to the body with which it is connected: *Ehrenfelt's Appeal*, 101 Pa. 186; *Fernstler et al. v. Seibert et al.*, 104 Pa. 196.

Upon questions arising under the discipline as upon those arising under the articles of faith the decisions of the ecclesiastical courts are ordinarily final, and they will be respected and enforced by the courts of law: *German Reformed Church v. Seibert et al.*, 3 Pa. 282; *Stack v. O'Hara*, 90 Ib. 477; *Schlichter v. Keiter*, 156 Ib. 119. But if such decisions plainly violate the law they profess to administer or are in conflict with the laws of the land they will not be fol-

lowed : Com'th *ex rel.* v. Cornish, 13 Pa. 288 ; Stack v. O'Hara, *supra*.

Now the itinerant plan for pastoral supply of the churches is a distinguishing feature of the polity of the Evangelical Association. The individual congregation may not select for itself, but is bound to accept the ministerial supply provided for it by the proper authorities under the discipline. Their action in this regard affords a distinct test of obedience and of adherence to the ecclesiastical organization: Henderson v. Hunter, 59 Pa. 335. Those congregations or parts of congregations that refuse the supply sent them by authority of the regular ecclesiastical agencies, acting in accord with the general conference, and receive the supply sent under the authority of an irregular minority body, do not adhere to the organization, but put themselves in open revolt against it. By such action they subject themselves, as individuals, to suspension or expulsion from the church ; as congregations and annual conferences, they expose themselves to punishment by excision from the body with which they have ceased to be in harmony, and against the authority of which they have been arrayed themselves.

Upon the facts, as they appear in the evidence, the learned master should have found that the general conference meeting in Indianapolis, in 1891, was the regular and the duly constituted general conference of the Evangelical Association of North America ; and that the body which met the same year in the city of Philadelphia was an irregular and hostile body, having no ecclesiastical authority whatever under the provisions of the Book of Discipline.

He should then have found that those who adhere to the regular general conference, and submit to its authority, constitute the Evangelical Association. He should also have found that those who adhere to the irregular and hostile body have, by their own conduct, placed themselves outside of the denomination whose authority they reject.

These conclusions we reach independently of the various

questions which relate to the trials of the bishops and the organization of the East Pennsylvania conference, in 1891. But these questions are fairly before us, and we have no disposition to decline an examination of them; indeed, the reasons for the conclusions already reached will be made the more apparent by a brief discussion of those questions.

Bishop Dubbs was tried before a properly constituted trial conference, found guilty, and sentenced to suspension from office until the next general conference. He denied the justice, but not the validity, of his conviction, and he acquiesced in the sentence pronounced upon him. No question affecting this trial and sentence is presented by this record, and an examination into the subject is unnecessary and irrelevant. The charges on which Bishop Dubbs was tried were formulated in November and December, 1889. The trial took place in February, 1890.

In December, 1889, Bishops Esher and Bowman were separately examined by three elders on charges which had been made in certain religious periodicals, and brought to the attention of the examining elders by one who acted as a prosecutor. The examining elders found the charges to be without foundation in each case, and prepared a certificate showing the nature of the charges, the examination made by them, and their finding acquitting the accused thereon, and delivered a copy of such finding to each of the bishops.

A few weeks later, substantially the same charges were made by another prosecutor; another examination was made by three elders summoned by him. This examination resulted in a finding that the charges were well founded, and the calling of a trial conference for the trial of each of the bishops upon them.

From the beginning of this second proceeding both Bishop Esher and Bishop Bowman set up the former examination and acquittal as a conclusive bar against it, and insisted that the second board of examiners, and the trial

conference convened by their direction, were without jurisdiction. The examining elders, however, and the respective trial conferences called by them, promptly overruled the point raised by the bishops, asserted their jurisdiction and proceeded with the trial.

The bishops declined to appear; but in their absence, and with full knowledge of the previous examination and acquittal of each on substantially the same charges, the trial conference heard the testimony, found the accused guilty, and sentenced each to suspension from the episcopal office until the next general conference. Neither of the bishops acquiesced in the sentence. On the contrary, each insisted that his second examination and the proceedings of the trial conference following it were illegal and void; that the sentences were without authority, and might properly be disregarded by them and by the whole church.

The decision of the question thus raised by the bishops depended upon the proper interpretation of certain provisions of the Book of Discipline. It was therefore a question of ecclesiastical law, to be decided by the highest ecclesiastical tribunal in the denomination. The trial conferences took the responsibility of deciding it in favor of their own jurisdiction. The bishops took the responsibility of deciding it the other way. The trial conferences knew that if the general conference overruled them upon this point all their proceedings must necessarily be held to be illegal and oppressive. The bishops knew that if the general conference did not sustain their point, their conduct in refusing to appear, and in disregarding the sentence pronounced upon them, must be held to be insubordinate, and their subsequent official acts to be invalid. Both sides were willing to take the risks, and to act upon their own interpretation of the discipline. The result was wide-spread discussion throughout the church, diverse conclusions, bitter dissensions, and, finally, as we have seen, a disruption of the ecclesiastical body. For these unhappy consequences,

which a more conciliatory course might have avoided, an impartial public will hold the bishops and the trial conferences responsible.

When the general conference met in 1891, it took notice of the dissensions and divisions that had grown up in the annual conferences, and in the congregations of which they were composed, and made inquiry into the causes that had led to such unhappy consequences. The result was an exposition of the discipline in accordance with the contention of the bishops, an indorsement of their conduct in disregarding the sentences imposed upon them, and an authoritative deliverance that the second examination, the trial, conviction and sentence of each of the bishops was irregular, illegal and void. This validated all the official acts of both the bishops, and invalidated the acts of the annual conferences, and others, done on the theory that the convictions and sentences were legal.

We have before us, therefore, the decision of the "supreme court of law" of the Evangelical Association upon the meaning and effect of one of the provisions of the Book of Discipline. This decision cannot be said to violate the Constitution, or the law of the land. It does not violate any law or usage of the ecclesiastical body. It is therefore binding on the Evangelical Association and its membership, and it must be respected by this court.

Whether the general conference disposed of this question in the wisest manner is not now for consideration. Its decision settled the law for the Evangelical Association, and we must recognize and apply it in this case. Here again the body met in Philadelphia in 1891, put itself in open rebellion against the authority of the Evangelical Association. It decided that a charge preferred against a bishop, an examination into its truth by three elders, and an acquittal by them, had no significance whatever; but that the charge might be renewed and the examination repeated as often as a prosecutor could be found, or until a conviction

and sentence could be obtained. It then approved the conviction and sentence on Bishops Esher and Bowman, and expelled both from the association. At the same time it reversed the proceedings in the case of Bishop Dubbs, which had been approved by the Indianapolis general conference, relieved him from sentence, and re-elected him to the office of bishop. In what manner the Philadelphia body could have made its antagonism to the general conference more open and pronounced it is not easy to see.

It only remains to consider briefly the claims of the rival East Pennsylvania conferences. The time and place for the meeting of the annual conference of East Pennsylvania in 1891 had been regularly fixed. The place was Ebenezer church, in the city of Allentown. The time was the 26th of February. This was about one year after the trial and sentence of Bishop Bowman, and after his own position, and that of a large part of the church upon the question of the legality of his suspension were well known, Bishop Bowman came to Allentown to preside over the conference. The board of trustees of the Ebenezer church, although without any ecclesiastical jurisdiction over the subject, met and decided that Bishop Bowman was incompetent to preside over the conference because of his suspension by the trial conference. They then undertook to enforce the sentence of suspension by preventing him from entering the church edifice. A majority of the members of the conference was in active sympathy with this action, and co-operated with the trustees for the purpose of carrying it into effect. They signed a paper denying his right to preside, and by a committee from their number presented this paper and a copy of the action taken by the trustees to the bishop. At the hour fixed for the meeting of the conference the bishop approached the doors of Ebenezer church. He was intercepted by the trustees and others and prevented by the use of force from entering. Meantime the members of conference assembled in the building, and a majority of them,

well knowing that the bishop was at the door, and prevented by force from entering, treated him as absent, and organized the conference by the election of a president to discharge his duties.

They were well aware of the point raised by him affecting the legality of his sentence, and of the fact that a considerable portion of the whole church concurred with him in opinion. They knew also that the general conference would be in session within a few months, and that the question could then be decided. Notwithstanding all this, these persons acted, as the trial conference had done, on their own exposition of the discipline, and took the risk of being overruled by the general conference. They deliberately staked their official action and their ecclesiastical position upon their own decision of a question that was not within their jurisdiction, and they lost.

The general conference sustained the point taken by the bishops, held their sentence and conviction illegal, and the action of the conference of East Pennsylvania to be disorderly and in violation of the Book of Discipline. The organization effected by the forcible exclusion of the bishop was declared to be illegal, and the body itself, while so organized, to be without ecclesiastical character or authority. It is clear that the regularity and legal effect of the organizations of the conference, in the manner in which it was accomplished, raised an ecclesiastical question. Its decision depended upon an exposition of certain provisions of the discipline which it was the duty of the general conference to make. The decision actually made does not violate the laws of the state or of the church, and is conclusive upon the ecclesiastical body of which the general conference is the chief tribunal. For this reason it should be followed by the civil courts. Whatever authority may be conceded to the action of the East Pennsylvania conference by those who adhere to it, the judgment of the general conference leaves it without authority in the body with which it had

been formerly connected. Its appointments, therefore, confer no right, and impose no duty, on preachers, church members or congregations adhering to the general conference, and we cannot recognize a title derived, like that of the defendants in this case, from the action of that body as good against the general conference or its adherents.

On the other hand, the action of Bishop Bowman and a few friends, in organizing a rival conference, was wholly unauthorized by the discipline; and the body so organized not having a quorum of those entitled to sit as members of the East Pennsylvania conference, was an irregular body, without authority or ecclesiastical character under the discipline. The annual conference may sit without a bishop, and its acts be valid in all respects. A bishop cannot sit with less than a quorum and make by his presence a legal conference out of that which would not have been such in his absence. If present he presides, but he is not a necessary part of the body; and his presence therefore with those who without him would be without authority, can add nothing to them. If there had been no division in the conference, the presence of the bishop could not have given to a few of its members the character and power of a quorum. His conduct, and that of his friends, in suspending and expelling presiding elders and others was a clear usurpation of power, and the sentences so pronounced had no force or effect.

The situation in Allentown, in February, 1891, was certainly remarkable. A majority of the members of the annual conference was in one place, refusing the bishop admission and proceeding upon the assumption that he was absent. The bishop and a handful of adherents were in another place assuming the powers of a quorum and fulminating their orders and judgments with the utmost self-complacency and in plain disregard of the discipline. The appointments made by this body gave no legal right to the appointees and imposed no legal duty on the congregations

concerned. But the meeting presided over by the bishop was a meeting of those who adhered to the ecclesiastical body whose legislative and judicial head was the general conference. Its members were confronted by a state of things for which the discipline made no provisions, viz.: the revolt of a majority of the members of the conference with which they were connected. They were compelled to choose between adherence to the bishop and the body with which they had been connected and adherence to the annual conference of East Pennsylvania, which had undertaken to put itself in an attitude of independence and hostility to that body. They chose the former. They were, as a consequence, practically outside of the annual conference to which they had belonged, and compelled to seek recognition in some capacity from the general conference. Their organization was, therefore, necessarily provisional. Their authority depended, in the first instance, on their own consent and that of the congregations and individual members whom they represented; and their only appropriate business was to provide temporarily for the religious and ecclesiastical care of those who adhered to the organization until the general conference could meet and take appropriate action.

The general conference met in October of the same year, at Indianapolis. Its attention was drawn to the condition of the church in the East Pennsylvania conference, and to the action of the rival bodies claiming jurisdiction over the congregations within its bounds. It made a thorough investigation into the action and attitude of the majority body and was led to recognize the revolt made by it as an accomplished fact. The Philadelphia conference, called by the East Pennsylvania annual conference, it recognized as a rival and hostile body, and declared officially that it was "a gross offense against our church," and that the persons engaged in holding and sustaining it had "thereby thrown

off their allegiance to our church and disentitled themselves to any of the privileges of membership therein."

So far the action of the general conference seems to have been regular. But when it came to consider the provisional gathering of its adherents it exceeded its powers under the discipline. It declared the minority body under the presidency of Bishop Bowman to be the only lawful and regular conference of the Evangelical Association in and for the conference district of East Pennsylvania for 1891, and pronounced all its acts and proceedings regular and lawful.

In so far as these acts related to the temporary care and supply of the congregations represented in the body, they were, as we have already seen, justified by the necessities of the situation, and their ratification by the general conference cured their original want of authority under the discipline, and clothed them with authority of the general conference. But in so far as these acts dealt with the ecclesiastical positions or functions of those not members of the provisional body, or with the congregations not represented therein, they were unauthorized assumptions of power that the general conference could not ratify, because, like the annual conferences, it was bound by the frame of government contained in the Book of Discipline. Out of the provisional body the general conference could create an annual conference, assign its boundaries, and give it a name, and thereafter it would become one of the regularly-constituted church tribunals. But until this was done, it was a body for which the polity of the church had made no provision; which had no legislative or judicial power and no ecclesiastical standing. Its assumption of authority over those represented in the body could be ratified and affirmed by the general conference. Its assumption of authority over those not represented in the body was incapable of ratification and affirmance. As to such persons and congregations the want of jurisdiction was apparent and incurable.

We formulate our conclusions as follows :

First. The general conference, that met at Indianapolis in 1891, was the regular successor of that of 1887, and was the general conference of the Evangelical Association of North America.

Second. The alleged general conference that met in Philadelphia, in 1891, was an unauthorized body ; and its assumption of ecclesiastical authority was an act of rebellion against the organization with which its members had been connected, and whose name it adopted.

Third. Those annual conferences, congregations and individual church members that adhere to the general conference constitute the Evangelical Association.

Fourth. Those annual conferences, congregations and individual church members that adhere to the Philadelphia body are not within the Evangelical Association, but have become by their own acts an independent and hostile association.

Fifth. The property which, prior to 1891, belonged to the Evangelical Association, now belongs to, and must be controlled by, those who still constitute that organization.

Sixth. The assignment of the plaintiff Kreckler to the pastorate of the Immanuel Church, in the city of Reading, having been made by a provisional body of adherents without ecclesiastical authority, gave him no title capable of enforcement under the law of the church or the law of the land ; but the subsequent ratification and adoption of the assignment by the general conference gave him a title, from and after that date, good under the law of the church and therefore good under the law of the land.

Seventh. The assignment of the defendant Shirey to the same pastorate, by the illegally organized annual conference of East Pennsylvania, or by the president of that body, sitting without right, and the presiding elders, conferred no title upon him under the discipline and laws of the church, as expounded by its court of last resort. He has shown,

therefore, no title capable of enforcement under the law of the land against the Evangelical Association or its adherents.

Eighth. The question is thus seen to be, not where is the majority of Immanuel Church, or of the East Pennsylvania conference, but which of the parties to this litigation adheres to the general conference? Ecclesiastical standing, and not numbers, determine the title to and the right of control over the property held for the use of the Evangelical Association.

The decree of the court below is reversed, and it is now ordered, adjudged and decreed that an injunction be issued to restrain the defendants from exercising control over the church edifice of the Immanuel Church, in the city of Reading, and from excluding the plaintiff, or any other person appointed to the pastorate of said church, under the discipline of the Evangelical Association and the decision of the general conference, from the pulpit of the said church and from the exercise of his pastoral functions therein.

It is further ordered that the defendants pay the costs accrued in this case.

Religious association—Division in congregation—Rights of elder and pastor—Use of church property—Multifariousness.

FUCHS ET AL. v. MEISEL ET AL.

(Supreme Court of Michigan, November 7, 1894.)

The duly-appointed elder and the pastor of a voluntary religious association may join with members of the association in a suit to recover possession of the church and parsonage, and to enjoin the trustees and dissenting portion of the congregation from interfering with each in his ecclesiastical rights, and also to compel an accounting for collections taken up, which are payable to the elder and pastor as salary.

How. St., § 4649, providing that any religious association, after exercising the privileges of a corporation for ten years, shall be presumed to have been legally organized, does not *per se* change such an organization by the lapse of time into a corporation.

How. St., § 4639, which provides that no ecclesiastical law or custom is to be recognized in the tenure of real estate, does not deprive members of a congregation of their right to compel the trustees to permit the use of the church building according to the discipline and usages of the denomination.

The trustees of a congregation of the Evangelical Association, the chief characteristic of whose discipline is the itinerancy of its elders and preachers and power of the general conference to appoint the same, cannot, though supported by a majority of the congregation, deprive the duly-appointed elder and preacher of their ecclesiastical rights.

A bill which charges that defendants have usurped control of a church edifice and funds, whereby certain of the plaintiffs are deprived of pastoral rights and emoluments and others of the use of the church for the purpose of worship according to the rules of a particular denomination is not multifarious.

Appeal from Circuit Court, Bay county, in chancery ;
ANDREW C. MAXWELL, Judge.

Action by John M. Fuchs and others against Herman Meisel and others. There was a judgment for defendants, and plaintiffs appealed. Reversed.

The bill in this case contained, in substance, the following averments :

The Evangelical Association of North America is a religious denomination organized about 1800, under the "connectional" or "associated" form of church government, founded upon that of the Methodist Episcopal Church, and having a system of graded, executive, legislative and judicial ecclesiastical bodies and officers, and a code of rules known as the "Discipline." The territory covered by said denomination is divided into "Annual Conference Districts," in each of which is held a yearly meeting of the preachers of the denomination located within such district. Every preacher who holds a pastorate within the district must attend every session of his conference. For cer-

tain purposes of local administration, each annual conference exercises jurisdiction over all its own members and over the congregations within its limits. By the general conference held every four years bishops are elected for a term of four years. It is the special duty of a bishop to preside over the annual conferences, and, with the aid of the presiding elders thereof, to appoint at the conference session the preachers to their respective pastoral charges for the ensuing year, "the same" being the only recognized method of appointing ministers in use in said denomination since its origin. Neither the lay members of the several congregations, nor the trustees thereof, according to the discipline of said denomination, have any voice or vote in the selection of their pastors, nor any power to reject a pastor who has been appointed in the manner aforesaid. The Michigan annual conference of this denomination has been in existence over sixteen years, and has always embraced within its limits all the preachers, members and congregations of the denomination in Bay county, Michigan. Each annual conference elects presiding elders for service within its own bounds and for terms of office not exceeding four years. Each year the conference assigns to each presiding elder a certain district within its territory for supervision. Under the discipline, a presiding elder is required to superintend the spiritual and temporal affairs of the denomination within its district, to enforce all disciplinary provisions, to hold services and otherwise to officiate in the various kinds of worship in his district, and once in every three months to call and preside over a quarterly conference held in the house of worship of each pastoral charge. In this denomination a pastor's appointment over any particular charge lasts for one year only, though he may be reappointed at annual conference, but not more than three times in succession. A presiding elder's appointment over any particular district in like manner is good for only one year, though he may be reappointed over the same district four times in

succession. Under the discipline and usages of the denomination each pastor and presiding elder is entitled, by virtue of his office, to certain emoluments derived from collections taken up among the members of their charges. Every pastor who is a married man is entitled to occupy the parsonage belonging to his congregation. "Stewards" are appointed in each charge to collect funds to pay the pastor's salary and to procure a dwelling-place for him if a married man. Under the discipline each quarterly conference has to provide for the support of the pastor and the presiding elder, and every member must contribute to their support according to his means, under penalty of trial under the church rules. The discipline also provides that each annual conference may provide for the yearly salary of its preachers. In 1886, the Michigan conference enacted that each presiding elder should be entitled to a yearly salary of at least \$500, and each pastor of the rank of elder should receive the same amount. The discipline provides "that when any trustee of a church withdraws from the denomination he shall cease to be trustee," and also, that "when any land is conveyed for the use of any congregation, said land shall be kept in trust as a place of divine worship by the ministers and membership of the Evangelical Association of North America, with power to dispose of and convey the same, subject to the discipline, usages and ministerial appointments of said church or association, as from time to time authorized and declared by the general conference thereof, or by the particular annual conference within whose bounds the premises are located." In like manner with regard to parsonages, the discipline provides "that if any land is conveyed to said denomination or any of its congregations for the erection of a dwelling-house for the use of preachers, the said land must be held in trust, to be kept, used and maintained as a place of residence for the preachers of the denomination who may from time to time be duly stationed in said place, subject to the discipline

and usages of said denomination." In the year 1878 there was organized, "as a voluntary association," by and among members of the denomination in and about Bay City, under the supervision of a preacher of said denomination, a congregation thereof under the name of "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, and State of Michigan." Until the acts of the defendants herein complained of, said congregation, without dissent, always acted as and claimed to be a part of said denomination, and subject to its rules and usages and to the jurisdiction of the general conference of the denomination and of the Michigan annual conference; and in particular, said congregation always accepted as their pastor and presiding elder only such persons as had been appointed thereto according to the discipline and usages of said denomination. "With a single exception, the said Zion's society, in each and every year after its organization, in 1878, up to the spring of 1891, solicited and received from the said Michigan annual conference an appropriation or contribution of money for the purpose of maintaining the said society and paying its current expenses as a society belonging to said denomination. At times such yearly appropriation amounted to \$500." In 1878, with money contributed for the purpose by members of the denomination within the bounds of the Michigan conference and by the members of said conference, there was purchased and in part paid for a lot of ground in Bay City (describing the same), and with funds derived from the same sources said society thereupon erected upon said lot a building, which was used for a house of worship, according to the rules and discipline of said Evangelical Association. In November, 1882, the owner of said lot conveyed the same in fee to "Zion's Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." The deed contains the following clause: "This deed being made pursuant to a contract for the sale of said premises

made by Jennie F. Paine to August Meisel, Frederic Koch and August Kosky, bearing date the said 8th day of June, 1878, which contract has been assigned by said Meisel, Koch and Kosky to the trustees of said party of the second part hereto, and said premises having been conveyed subject to said contract by said Jennie F. Paine to James T. Lawson, by said Lawson conveyed to Hiram A. Jones, and by said Jones conveyed to John W. Forsyth, above named."

Afterwards, in 1889, with funds contributed by members of the denomination both in said Zion's society and elsewhere within the bounds of the Michigan conference, and collected by preachers of said conference from persons not members, upon the representation that such contributions were to be used to erect a church of said denomination, there was erected by said society, on lot 7, a new house of worship for use according to the usages and discipline of said denomination, and not otherwise. In laying the corner-stone of said new edifice, the pastor in charge (being a person appointed thereto from the Michigan conference), in the presence of said congregation, and with its consent, used the forms prescribed in said discipline. These forms require the officiating clergyman to declare that "we lay this corner-stone as the foundation of a house to be dedicated to the service of the Most High, according to the order and rules and for the use of the Evangelical Association." Afterwards, when completed, said edifice was dedicated under the discipline by a bishop of said denomination. The disciplinary form required the bishop to declare that "we now declare, designate and consecrate this house as the [name of the church] of the Evangelical Association of [name of place]," for divine worship and the observance of "devotional services, rules and customs adopted and practiced in public worship by the Evangelical Association." In November, 1884, with funds subscribed by members of the Evangelical Association, and solicited by the pastor in charge (appointed from the Michigan conference), there was

purchased by the said Zion's society another lot (No. 6) in Bay City. Such lot was conveyed by the owner to "the Zion Church of the Evangelical Association of North America in Bay City, County of Bay, State of Michigan." In the early spring of 1889, said Zion's congregation solicited and received from said Michigan annual conference \$500, to be used in part payment for a parsonage to be erected on said lot 6. With the money so donated, and with other funds contributed by the members of the denomination, there was erected on said lot a parsonage "for the use, as a dwelling-house, of the preacher who should be duly appointed by the Michigan annual conference as the pastor of said congregation under the discipline." Until 1893, no person had ever been admitted to membership in said congregation except such as were members of the denomination; and no one had acted as trustee or officer of the congregation except persons who had been admitted to the denomination and into said congregation according to the rules of the denomination. At a regular session of said Michigan conference, in April, 1890, the plaintiff, Rev. George A. Hettler, was elected presiding elder for the ensuing four years; and at a session of said conference in April, 1893, the district which includes said Bay City charge was assigned to said Hettler for the ensuing year. Said Hettler is a duly ordained elder of the denomination, and a member of said conference, and was such prior to 1890. The complainant, Rev. John Fuchs, is a duly ordained elder of the denomination, and a member of said Michigan conference. At the session of said conference held in April, 1893, he was appointed by the presiding bishop, with the aid of the presiding elders of said conference, pastor of said Zion's Church. Said complainant is a married man. Since their appointment as aforesaid, said Hettler and Fuchs have endeavored to enter said church and officiate therein, as presiding elder and pastor, respectively, and said Fuchs has demanded from defendants the possession and right to

occupy the said parsonage. But the defendants and their adherents in said congregation have excluded both of said complainants from the church and said Fuchs from the parsonage, and have denied their official authority, and threaten to continue so to do, and to exclude them "from the enjoyment of any perquisites or emoluments belonging to the office of presiding elder and pastor, respectively, of said charge;" but they recognize the defendant, Schneider, as their lawful pastor, and they admit him into said church as pastor, and permit him to receive the collections taken up for the pastor's salary, and have admitted him into the occupancy of the parsonage, and they threaten to continue thus to support said Schneider in the possession of said office, and the use of said church and parsonage. "In March, 1893, the defendants and their adherents in the said congregation formally resolved and declared that they would no longer submit to the authority or the rules of the officers or the constituted tribunals of the said Evangelical Association, but that they would separate from and be independent of said Michigan conference in all respects, and they notified said conference of this resolution." The complainants Hebinger and Fenske are now, and for some years past have been, members of the denomination and of the said Zion's Church, and have attended worship at the latter, and have contributed to the support of said congregation. Said Hebinger has not attended services since the defendant Schneider has been acting as pastor, because he believed said Schneider not to be the lawful pastor. Besides the complainants, "there are a large number of the members of said congregation who dissent from such unlawful acts and proceedings, and who still adhere to the said Evangelical Association and its rules, and still recognize and submit to the authority of the complainants, Hettler and Fuchs, respectively, as their presiding elder and duly appointed pastor, and who desire the said church edifice and parsonage to be used by said Hettler and Fuchs as by the disci-

pline required and permitted as aforesaid." The defendant Schneider now holds, and refuses to surrender, the books and papers pertaining to the affairs of the congregation, which, under the discipline and usages of the denomination, rightfully belong to the custody of the lawful pastor—such as the registers of marriages, births, deaths, etc., the membership lists and the financial accounts of the congregation. Since April, 1893, the stewards of the congregation have collected funds applicable, under the usages of the denomination, to the payment of the pastor's salary. Part of said funds have been paid over to defendant Schneider. Defendants and their adherents threaten to continue to take up such collections and pay them to said Schneider, to the extent of at least \$600 per annum; and they pretend that they have hired the services of said Schneider, for a year or more, as pastor. In excuse of these unlawful acts, defendants and their adherents pretend that the said Michigan conference of 1893 was not a lawful conference of the Evangelical Association, and that, therefore, complainant Hettler's appointment over the presiding elder's district, and the complainant Fuchs' appointment as pastor, were not valid. In this regard complainants say that said Michigan conference of 1893 was composed of the preachers within the district theretofore duly fixed by general conference, and duly qualified under the discipline to be members of said body, and that the time and place at which it was convened had been duly fixed the preceding year by the presiding bishop and a majority vote of said conference duly convened. The bishop presiding when complainant Fuchs was appointed pastor had been elected as bishop by a general conference of the denomination held in October, 1891, at Indianapolis.

The bill then sets forth facts to show the regularity and validity of said Indianapolis body as a general conference of this church. Prior to assuming the office of pastor of Zion's Church, defendant Schneider had withdrawn from

the Michigan conference and from the Evangelical Association. Complainants sue on behalf of the members of the denomination and of the Michigan conference, "and especially on behalf of the members of said Zion's Church congregation at Bay City who still adhere to said Evangelical Association." The defendants (except Schneider) are the trustees of said Zion's Church, "and, as such, have the actual possession of the said church edifice and parsonage, and are exercising control thereover." The relief prayed is as follows: That defendants be restrained from interfering in any way with the plaintiff Hettler in the discharge of his duties as presiding elder of said congregation, and in taking up collections from said congregation for his salary; from withholding from said Hettler funds heretofore collected from said congregation as and for the salary of the presiding elder; from preventing Hettler from entering the church and officiating therein as presiding elder, and from holding his quarterly conferences therein; from interfering with complainant Fuchs in the discharge of his duties as pastor; from preventing his entrance into the church, and from interfering with his collection of contributions for his salary; from excluding Fuchs from the parsonage; from withholding from said Fuchs the said records, registers, etc., pertaining to the congregation, and lawfully belonging to the custody of the pastor. That defendant Schneider be restrained from acting as pastor of said congregation; from officiating in and about said church edifice as pastor; and from taking up collections from said congregation for pastor's salary. That the defendants account for moneys heretofore collected by them (as and for pastor's and presiding elder's salary) from said congregation, and be decreed to pay over the amount, when ascertained, to the complainants. That the rights of the respective parties be ascertained and decreed.

A demurrer was interposed, stating the following reasons:

(1) That the bill covered "distinct matters and causes, in

several whereof the complainants are not in any manner in common or jointly interested or concerned." (2) That the bill is multifarious. (3) That the bill states no cause for relief of any kind. The demurrer was sustained.

T. A. E. & J. C. Weadock, Judd, Ritchie and Esher, for appellants.—The title to church property of a divided congregation is in that part of it which is acting in harmony with the ecclesiastical laws, usages, customs and principles which were accepted among them before the division: *Bear v. Heasley* (Mich.), 57 N. W. 270; *Schnorr's Appeal*, 67 Pa. St. 146; *McGinnis v. Watson*, 41 Pa. St. 9; *Sutter v. Trustees*, 42 Pa. St. 503; *Roshi's Appeal*, 69 Pa. St. 468; *Curd v. Wallace*, 7 Dana, 195; *Ferraria v. Vasconcelles*, 23 Ill. 456, 457; *Methodist Church v. Wood*, 5 Ohio, 283.

Pratt, Van Kleeck & Gilbert, for appellees.

GRANT, J. (after stating the facts).—1. We see no force in the contention that the bill sets forth no grievance common to all the complainants, and seeks no common relief. The complainants are interested in the same subject-matter, and all claim one common right to use the church, although in different ways. Fuchs, as pastor, and Hettler, as presiding elder, are entitled to the use of it for the purpose of conducting divine worship. Fuchs is entitled to the use of the parsonage in connection with the church, and the other complainants are entitled to the use of the church for the purpose of worship according to its discipline and usages. We therefore think the bill is not multifarious.

2. While the bill alleges that Zion's Church at Bay City is not a corporation, but a voluntary association, it is nevertheless insisted that it is a corporation, because the bill shows that it has exercised the franchises and privileges of a corporation for a term of more than ten successive years; that it has bought and held real estate in its corporate name, has erected a church and parsonage, and that all its tem-

poral affairs are controlled by a board of trustees. It is therefore argued that its rights must be controlled by the same rules that apply to religious societies duly incorporated. In support of this, § 4649 of Howell's Statutes is cited. This section provides that "whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for the term of ten successive years, they shall be presumed to have been legally organized in pursuance of the laws of this state." This statute creates only a presumption. It does not of itself change a voluntary organization by lapse of time into a corporation. It was held in *Smith v. Bonhoof*, 2 Mich. 129, that, under this statute, "no church can become incorporated, provided the powers conferred by the statute upon the incorporators is, by the constitution, laws or usages of the church lodged in another body." See, also, *Allen v. Duffie*, 43 Mich. 3, 4 N. W. 427; *Methodist Church v. Clark*, 41 Mich. 730, 3 N. W. 207. The allegation, therefore, that the church is a voluntary association must be assumed as true.

3. It is next argued that no trust is created by the conveyance to the Evangelical Association of North America; that, therefore, the legal title is in the local church; and that the Evangelical Society of North America obtained no right to the church property or its use under the statute abolishing uses and trusts. The complete answer to this argument is that the general association is not a complainant in this case, nor is it seeking to enforce any title to or claim over the property. The complainants claim the right to its use under the discipline and usages. A conveyance or bequest to a religious association, or to trustees for that association, necessarily implies a trust. The deed in this case shows that the contract was made to certain persons as trustees for the church, and that the deed was made pursuant to that contract. We would naturally look to the written declarations in the constitution, by-laws and written documents of the organization to ascertain the trust and the

purpose for which the property was conveyed. If the deed refers expressly or by implication to such writings, courts will look there for the declaration of the trust. It is by no means clear that these defendants, who are now the trustees, are in position to set up the statute of frauds. Neither the grantor nor any other person claiming under him is setting up this claim. Both parties claim under the same conveyance. In *Lynd v. Menzies*, 33 N. J. Law, 164, it is said: "The imperfection relied on was the absence of an incorporation. But the want of this quality does not at all affect the rights and duties of pastor and people towards each other. The effect of being incorporated is to facilitate the acquisition and transfer of property and to enable the congregation to be represented in the convention of the diocese. By the canonical law of this denomination of Christians it is not necessary, in order to constitute a church, that the congregation should take the form of an incorporated body. Indeed, the very law of this state which provides for the incorporation of this class of churches presupposes and requires that there shall be, precedent to the inception of proceedings, a congregation of the Protestant Episcopal Church in this state, duly organized according to the constitution and usages of said church. In the case now before us it plainly appears that this church was constituted in conformity to the ecclesiastical law and usages applicable to it. and the consequence is that the plaintiff, by his official connection with it, acquired all the customary powers and privileges appertaining to the rectorship." In any view of the case, the allegations of the bill are sufficient to require an answer and proofs.

4. The principal and important question in the case is whether the trustees and the members of this local church at Bay City can, by a majority vote, withdraw its connection with the general body, take the church property with them, set aside the itinerant plan, and deprive their regularly appointed ministers of its use. In this determination

the allegations of the bill alone can be considered. *Ex parte* affidavits, which were used upon the hearing for a preliminary injunction, cannot be considered in the nature of an answer, and must be entirely excluded from this discussion. It is insisted that, under How. St., § 4639,¹ the violation of church discipline and church law is to be corrected by ecclesiastical tribunals, and that the state courts have no jurisdiction. Courts, of course, will not set aside the decrees and orders of ecclesiastical courts involving the construction of its own articles of faith or discipline. But this statute has never been so construed as to deprive those entitled to property rights, under the conclusive ecclesiastical order and decree, of a remedy which they otherwise have not. *Buettner v. Frazer* (Mich.), 58 N. W. 834, does not aid the defendants, for it was there said that "both must first exhaust the remedies afforded by the ecclesiastical body before the court will consider the questions involved." See, also, *Smith v. Bonhoof*, 2 Mich. 116, where is found an able discussion of this provision of the statute. Nor is this case ruled by that of *Wilson v. Livingstone* (Mich.), 58 N. W. 646. In that case the church was a corporation organized under the statutes of this state, and the difference between such a corporation and the case of a voluntary society was expressly recognized. It was there stated that the "obligations and rights of the members of such a voluntary society are to be measured by their articles of association or constitution." In the present case the bill recognizes the defendant trustees as the lawful trustees, in charge and possession of the church property. No attempt is made to deprive them

¹How. St., § 4639, provides that "neither the canon law nor the decrees, nor any decree or order of any ecclesiastical council or body, . . . nor any customs or usage of any church, congregation or religious society, or religious order, shall hereafter be recognized or enforced in this state, so far as such law, usage or custom shall relate to the acquisition, the tenure or the control or disposition of any real estate, or interest therein, or any use or trust connected or to be connected therewith."

of its control or possession when used in a legitimate manner. The only purpose is to compel them to permit the use of the church and parsonage according to the discipline, rules, usages and polity of the church. It is immaterial in whom the legal title stands. One party may hold the title and another be entitled to its use and possession; or, as in this case, both may be entitled to its joint use and possession. It may be admitted for the purposes of this hearing that the title is in the local society or its board of trustees. The question is not, as in many of the cases cited in the briefs of counsel, in whom is the title? but, in whom is the right to its use for religious worship both as pastor and layman? The bill sets forth fully the history, the discipline and polity of the church, the title of complainants Hettler and Fuchs to the offices which they hold, and the right to the use of the church property to which said officers are entitled. The question presented relates exclusively to property rights, over which the proper courts have almost universally exercised jurisdiction. If the defendants' position be the true one, it follows that they are in no manner bound to the faith and tenets of this church, and that they may withdraw and take the property to any other denomination of Christians. The plan of the Evangelical Society is identical with that of the Methodist Episcopal Church. The itineracy of its clergy is one of its chief distinctive and fundamental principles. The church at Bay City entered into the voluntary association with full knowledge of its discipline, rules and usages, and agreed to be bound thereby. Its property was not purchased with funds raised entirely by its own members, but in part by members of the general conference and others, for the purpose of erecting a church of said denomination. The building was consecrated in accordance with its discipline, and for many years, and until after the schism in the church, the local body at Bay City accepted the pastor and elder appointed by the proper authorities. The churches of this body, when they entered it, voluntarily surrendered

the right to choose their own pastor, and agreed to accept the pastor appointed by the bishop with the aid of the presiding elders. Many authorities might be cited sustaining the rights of the complainants, but we shall refer to but few. They may be found in the briefs of counsel. This religious body is nearly identical in its discipline with that of the Methodist Episcopal Church. In each the itineracy of the clergy is one of the articles of its discipline. The right of the trustees of a local church of that denomination to close its doors against a pastor appointed by the bishop was passed upon in *Whitecar v. Michenor*, 37 N. J. Eq. 6, a case identical in its facts with the present one. The trustees in that case closed the building against the duly-appointed pastor, on the ground that it was not for the interest of the church that he should be its pastor, and that he was appointed against the wish of the majority of its members. The court say: "It is not claimed that there is any warrant in the discipline of the church for the action of the trustees, nor that the discipline provided that the wishes of the majority of the members shall determine whether the preacher appointed to the church shall act as such or not. If the church belongs to the Methodist Episcopal connection, as it is admitted that it does, there is no warrant of law, discipline or usage for the acts of the defendants. What is known as the itineracy of the preachers and the absolute power of the bishops over the appointment of the preachers to the churches is part of the discipline." An injunction was issued in that case to prevent the trustees from closing the church building against the regularly-appointed pastor. In a foot-note to that case are collated many authorities bearing upon the question, as well as upon the jurisdiction of a court of equity to grant injunction. Counsel for defendants, in their brief, admit that the local church at Bay City adheres to the faith of the Evangelical Association, and they say that the church services and Sunday-school are conducted in the same manner and in the same faith as

before, and that they withdrew in order to keep away from the factions of the association. The reasons for their action are stated in the brief. In the freedom of conscience and the right to worship allowed in this country the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them for their own purposes or transfer to any other religious body the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who chose to remain in the church and who represent the regular church organization. If complainants maintain the allegations of their bill, that they represent the regularly-organized body of the church and are its regular appointees, they are entitled to the relief prayed.

The decree of the court below is reversed, and the case remanded for further proceedings, with costs of both courts.

MONTGOMERY, J., did not sit. The other justices concurred.

The law is well settled that, in all matters of faith or which involve their internal discipline, churches will be left to themselves without interference from the secular courts, so long as the regulations of the churches are not immoral, or subversive of or in opposition to the general law of the land: *Schweiker v. Husser*, 146 Ill. 428; *Schlicter v. Reiter*, 156 Pa. 119; *Watson v. Jones*, 13 Wall. 679; *Smith v. Swormstedt*, 16 How. 288; *McGinnis v. Watson*, 41 Pa. 14; *Sutter v. Church*, 42 Ib. 509; *German Reformed Church v. Seibert*, 3 Ib. 282; *Henderson v. Hunter*, 59 Ib. 343; *Harmon v. Dreher*, 2 Speer Eq. 87; *Shannon v. Frost*, 3 B. Mon. 253; *Chase v. Cheney*, 58 Ill. 509; *Walker v. Wainwright*, 16 Barb. 486; *Church v. Wetherill*, 3 Paige, 296; *McIlvain v. Church*, 2 Woodw. Dec. (Pa.) 293; *Tuigg v. Treacy*, 104 Pa. 493; *Nance v. Bushy (Tenn.)*, 18 S. W. 874; *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 503; *Stewart v. Lee*, 5 Del. Ch. 573; and, within the above men-

tioned limitations, the decisions of the courts of religious bodies will be regarded as final and binding upon the courts of the land: *Germ. Ref. Ch. v. Seibert*, *supra*; *Stack v. O'Hara*, 98 Pa. 213; *Mitchell v. Mulholland*, 106 Ill. 189; *State ex rel. Watson v. Farris*, 45 Mo. 183; *Gaff v. Greer*, 88 Ind. 122; *Helbig v. Rosenberg*, 86 Iowa, 159; *Lamb v. Cain*, 129 Ind. 15; *Rike v. Floyd*, 6 Oh. C. C. 80; *Christ Church v. Phillips*, 5 Del. Ch. 429. But if the ecclesiastical decisions are in violation of the law of the land or violate the law they profess to administer they will be disregarded: *Com'th v. Cornish*, 13 Pa. 288; *O'Hara v. Stack*, 89 Pa. 477; *Batterson v. Thompson*, 8 Phila. 251. For the purpose of ascertaining whether there has been such violation, or a proceeding by an ecclesiastical officer or authority in violation of law, the secular courts may examine the matter independently: *Pounder v. Ashe*, 36 Neb. 564, or by a *certiorari*: *Jennings v. Scarborough* (N. J.), 28 Atl. 559; but it is held that, even in such cases, before a resort is had to the civil courts the remedies afforded by the ecclesiastical jurisdiction must be exhausted: *Buettner v. Frazer* (Mich.), 58 N. W. 834.

Where, however, the question involved is one of property, the civil courts may be at once resorted to: *Dieffendorf v. Ref. Col. Church*, 20 Johns. 12; *Shannon v. Frost*, 3 B. Mon. 258; *Forbes v. Eden*, L. R. 1 Sc. & Div. App. 568; *Ferrania v. Vasconcelles*, 31 Ill. 46; *Roshi's Appeal*, 69 Pa. 462; *Christ Church v. Church of Holy Communion*, 8 W. N. C. 542; *Beatty v. Ritchie*, 2 Peters, 566; *Langolf v. Sieberlitch*, 2 Pars. Eq. 64; *Cushman v. Church*, 162 Pa. 280; *Baptist Congregation v. Scannel*, 3 Grant, 251; *Lynd v. Menzies*, 33 N. J. L. 162; and in this connection the office of a priest or minister has been held to be property: *O'Hara v. Stack*, 90 Pa. 477 (the force of this decision is much weakened by *Stack v. O'Hara supra*); *Batterson v. Thompson*, *Schweiker v. Husser*, *supra*; so the position of a vestryman, where it is contested: *Dahl v. Palache*, 68 Cal. 248.

In such cases, it becomes at times necessary for the courts to pass upon questions of adherence to faith and doctrine or of discipline, but only as incidental to the determination of property rights, and the court can never pass upon the abstract truth or

falsehood of the doctrines ~~themselves~~: *Pounder v. Ashe*, *supra*; *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 503. *Nance v. Busby* 91 Tenn. 303. When the interference is that of a court of equity, its jurisdiction is based on the ground of trust, and its right to inquire whether funds or property, upon which has been impressed a trust for the maintenance or propagation of certain doctrines, or the support of a certain kind of worship have been diverted, or are threatened with diversion, to other purposes. In such cases it is manifest that it is absolutely necessary to ascertain and to declare what are the doctrines, or worship, which are the object of the trust: *Hale v. Everett*, 53 N. H. 71; *Gable v. Miller*, 10 Paige, 627; *Miller v. Gable*, 2 Den. 492; *Kniskern v. Lutheran Churches*, 1 Sand. Ch. 563; *Lutheran Evang. Ch. v. Gristgau*, 34 Wisc. 337; *Fink v. Umschied*, 40 Kan. 271; *Methodist Church v. Remington*, 1 Watts, 226. But in deciding between two parties, each claiming to be entitled as representing the church, the court will pay very great regard to the decisions of the church judicatories, as to the standing and the regularity of the standing of the parties. Indeed, it may be said that as a rule the court will regard the decisions of such judicatories upon such points as final: *East Norway Lake N. E. L. Church v. Halvorson*, 42 Minn. 503; *Mt. Zion Baptist Church v. Whitmore* (Iowa), 49 N. W. 81; *Prickett v. Wells*, 117 Mo. 502; *Ramsey's Appeal*, 88 Pa. 60; *Ferraria v. Vasconcelles*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ib. 185; *Second Eccl. Soc. v. First Eccl. Soc.*, 23 Conn. 255; *Baker v. Fales*, 16 Mass. 488; *First Presb. Soc. v. Fales*, 25 Oh. St. 128; *Robertson v. Bullions*, 1 Kern. 256; *Den v. Bolton*, 12 N. J. L. 206; *Smith v. Swormstedt*, 16 How. 288; *Watson v. Jones*, 13 Wall. 580; *Bouldin v. Alexander*, 15 Ib. 131; *White Lick Quar. Meet. of Friends by Hadley et al. v. White Lick Quar. Meet. of Friends by Mendenhall et al.*, 89 Ind. 136. And the decision even of an advisory body, or one constituted by the contending parties, as a species of arbitrator, will be treated with great respect: *Smith v. Pedigo* (Ind.), 19 L. R. A. 433. But this rule does not apply where there is a division of a religious society, and two bodies, each claiming to be the supreme authority: *Brundage v. Deardorff*, 55 Fed. Rep. 839; and in *Philomath College v. Wyatt* (Oreg.),

31 Pac. 206, it was held that the decision of a general conference of a religious body that a change had been effected in the constitution thereof would not be regarded by the courts as final; but opposed to this is the decision in *Lamb v. Cain*, 129 Ind. 518, where it is held that the decision of the duly authorized ecclesiastical tribunal, having jurisdiction of the matter, that a change of constitution had been properly effected, is binding on the Circuit Courts.

Where a division has arisen in any religious body, the property of that body belongs to the party which adheres to the regular organization and standards: *McGinnis v. Watson*, *supra*; *McAuley's Appeal*, 77 Pa. 397; *Landis's Appeal*, 102 Ib. 407; and this whether the seceding body be larger than the loyal body or not, for a majority by seceding puts itself outside of its former church, and loses all property rights therein: *Winebrenner v. Calder*, 43 Pa. 244; *Reorganized Church, etc., v. Church of Christ*, 60 Fed. Rep. 937; *Gibson v. Armstrong*, 7 B. Mon. 481; *Den v. Pilling*, 4 Zab. 653; *Johns Island Church Case*, 2 Rich. Eq. 218; *Field v. Field*, 9 Wend. 394; *Whitecar v. Michener*, 37 N. J. Eq. 6; *Smith v. Pedigo*, *supra*, and hence the majority of a congregation, or parish, attached to a church cannot claim the church property as against a minority, when the majority has departed from the standards, and the minority has not: *Mt. Zion Baptist Church v. Whitmore*, *supra*; *Bear v. Heasley*, 98 Mich. 279; a congregation which forms a part of an organized church cannot secede and carry with it its property: *Craigdallie v. Aikman*, 1 Dowl. 1; *McAuley's Appeal*, *supra*. But the majority of an independent organization may change its usages without forfeiting property rights: *Atty.-Gen. v. Gould*, 2 Law Reporter (Lond.), 495.

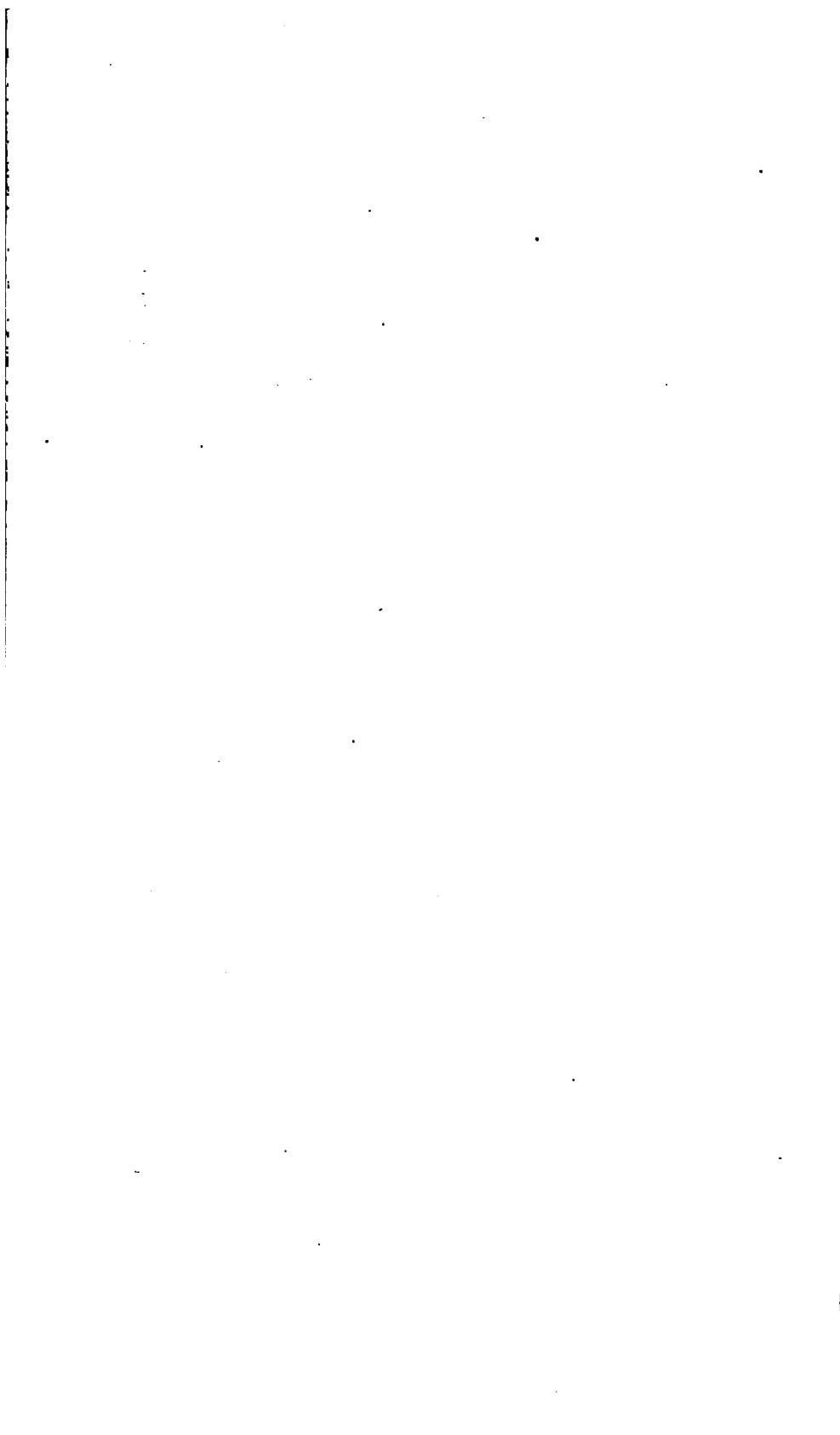


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ACCEPTANCE.

A deed must not only be delivered by the grantor, but must be accepted by the grantee. Acceptance may be express, by signing the deed or otherwise, or may be implied from circumstances. The assent of the grantee will be presumed where the deed is beneficial to him, until dissent appear. Where dissent or disclaimer appears, the deed is inoperative, and the title to the thing granted reverts to the grantor by remitter from such disclaimer. *Guggenheimer v. Lockridge*, 379.

ACCOUNT.

In an action by the receiver of an insolvent banking association against its former cashier to recover a balance alleged to be in his hands, defendant may be required to submit an account, when this is necessary to ascertain the amount of said balance. *Dunn v. Johnson*, 625.

ADVERSE POSSESSION.

Although in Maryland a deed of land to the trustees of a Roman Catholic church for a cemetery be void for failure to show on its face its purpose, adverse possession for twenty years under such deed perfects the title as against all persons not under legal disabilities. *Gump v. Sibley*, 22.

AGENT AND AGENCY.

See ESTOPPEL. *Texas Elevator and Compress Co. v. Mitchell*, 128;
ACCOUNT. *Dunn v. Johnson*, 625.

ANTE-NUPTIAL CONTRACT.

In an action by the wife to set aside an ante-nuptial agreement, by the terms of which she surrendered all claim to dower, it appeared

ANTE-NUPTIAL CONTRACT—Continued.

indisputably that defendant at the time the agreement was made owned real estate of the value of \$100,000, that the relinquishment of dower was not a condition of the engagement of marriage: that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that she acted without the aid of counsel. *Held*, that the general term properly reversed on the facts a judgment of special term in favor of defendant; and that plaintiff was entitled to the relief sought. *Graham v. Graham*, 676.

APPEAL.

See PRACTICE. *Wolf v. Great Falls Water Power and Town Site Co.*, 154; *Taylor v. Crockett*, 205.

APPLICATION OF PAYMENT.

If one indebted to another on several accounts fail to direct the application of a partial payment at the time it is made, the creditor may apply it on any account. *Pearce v. Walker*, 613.

In a suit to enjoin the enforcement of a power of sale in a mortgage on the ground that the debt had been paid, it appeared that the mortgagor was indebted to B. on a mortgage, and also to a firm of which B. was a member. A payment was made by a third person, with whom money had been deposited by the mortgagor, to another member, and the depository made a memorandum at time of the deposit indicating that the money was to be applied on the mortgage, but neither such member nor the mortgagee had knowledge of it. The uncontradicted testimony of this other member was that he received the money under an agreement with the mortgagor that it was to be applied on the debt due the firm. The payment was not entered in the mortgagor's account with the firm until twelve months later, though written evidence of it was given. *Held*, the creditor was not bound to apply the payment in satisfaction of the mortgage. *Ib.*

A creditor's right of application of a payment to either of several debts is not limited in time, but, having once made it, he cannot change it without the consent of the debtor. *Ib.*

A debtor cannot, after having made a payment, direct its application to any special debt. *Ib.*

ASSIGNMENT OF PATENT.

See PATENT. *Allison Bros. Co. v. Allison*, 422.

ATTORNEY AND CLIENT.

A solicitor cannot secretly purchase the subject-matter in litigation.

ATTORNEY AND CLIENT—*Continued.*

tion, or any interest therein, and hold the same adversely to his client. Such a purchase is voidable as to his client. *Sutherland v. Reeve*, 1.

If he do so purchase, he will be held to be a trustee for his client as to the property or interest so purchased. The purchase of the subject-matter of litigation is forbidden as against public policy, and because it places the solicitor under temptation to be unfaithful to his trust. *Ib.*

Where an attorney, without notice to his client, procured an order or judgment that the claim in litigation belonged to the attorney and that the suit proceed for the benefit of the latter, it was held the decree or order finding the attorney to be the sole owner of the claim, was improperly and fraudulently entered. *Ib.*

An attorney concealed material facts respecting his client's claim, and thereby obtained an assignment of the claim, which if known, to the assignor, he would not have obtained. *Held*, that concealment, under the circumstances, vitiated the assignment as much as misrepresentation or actual fraud. *Ib.*

BOUNDARY.

A conveyance, which is described as bounding upon a street or other public highway, conveys to the grantee, subject to the right of way in the public land to the centre of the street, provided that the grantor has title to the soil of said street. *Gump v. Sibley*, 22.

BURDEN OF PROOF.

The grantee of a deed made by an insolvent debtor, the consideration of which is an antecedent debt, has cast upon him, as against other creditors of the grantor, the burden of showing the *bona fides* of the transaction. *Murray v. Heard*, 146.

In a suit to set aside a deed, as obtained by undue influence and fraud, the burden of proof is upon the party charging such misconduct. The evidence in the present case reviewed, and *held* insufficient to establish that charge. *Taylor v. Crockett*, 205.

Where, in an action to set aside a conveyance of parents, who were seventy years old, and illiterate, to two of their children, who lived with them, taking charge of the farm, the deed recites a moneyed consideration, which is acknowledged in the deed as paid, when in fact there was none, the burden of the proof is on the grantees to show the absence of all fraud. *Smith v. Snowden*, 251.

The burden of proving payment is upon the party pleading it. *Pearce v. Walker*, 613.

The burden of proving that a direction as to the application of a payment was made known to the creditor is on the debtor. *Ib.*

CESTUI QUE USE.

In a court of equity a *cestui que use* may avail himself of all the defenses of which the trustee could. *Sutherland v. Reeve*, 1.

CHOSE IN ACTION.

A purchaser of a claim, which is not negotiable, can only acquire such interest as the vendor has. He will take the claim subject to the equities between the vendor and a third person claiming the equitable title. *Sutherland v. Reeve*, 1.

Not only does any purchaser of a chose in action take it subject to all equities of the original parties thereto, but a second or subsequent assignee takes it subject to all equities existing between any prior assignor and assignee. *Ib.*

CHURCH AND CHURCH PROPERTY.

The organization of a denominational body or church involves the adoption of both a creed and an ecclesiastical polity; abandonment or repudiation of either constitutes secession from the body holding said creed or polity. *Krecker v. Shirey*, 669.

Where the constitution of a church provides for the fixing of a place of meeting from time to time by a certain body, the act of fixing the meeting is a matter of administration and not of legislation, and the power to perform said act may be delegated. *Ib.*

The title to the corporate property of a congregation which is divided is in that part of the congregation which is in harmony with the laws, usages and customs as accepted by the body before the division took place and which adheres to the regular organization. *Ib.*

A congregation connected with a denomination must submit to the system of discipline peculiar to the body with which it is connected, irrespective of the views of the majority of the congregation itself. *Ib.*

Upon questions of discipline, as well as of faith, the decisions of the ecclesiastical courts are ordinarily final, and will be respected and enforced by courts of law. *Ib.*

The Discipline of the Evangelical Association of North America provided that a general conference should meet once every four years, and that each said conference should fix the place of meeting of the next conference, but, should it fail to do so, the oldest of the annual conferences (subordinate bodies) should fix the place. The conference of 1887 adjourned after referring the question of the next place of meeting to the Board of Publication, a corporation connected with the association. The board appointed I. as the place of meeting for 1891. The oldest annual conference, that of E., then appointed P. as the place of meeting. A large body assembled at I., a smaller one at P., in 1891. In December, 1889, B., the bishop within whose jurisdiction was the annual conference of E., was suspended by a trial conference which, under the laws of the

CHURCH AND CHURCH PROPERTY—Continued.

association, had power of suspension until the whole matter should be passed upon by the general conference. In February, 1891, a majority of the members of the annual conference of E. met at the appointed place and refused to allow B. to take part in the meeting. B. and some members who adhered to him met in another place. The majority body assigned one S. as pastor of a certain church at R. connected with the body within the conference. The B. body assigned to the same place one K. In October, 1891, the conference meeting at I. recognized the proceedings of the B. body as those of the regular annual conference, while the body meeting at P. recognized the meeting from which B. had been excluded. In the meantime S. had been admitted to and K. excluded from the R. church. On a bill being filed by K. and his adherents, *held,*

1. The general conference which met at I. in 1891 was the regular successor of that of 1887, and was the general conference of the Evangelical Association; and the annual conferences, congregations and church members adhering to it constituted the Evangelical Association, while the adherents of the P. body had become by their own act a hostile and independent organization.
2. The property which, prior to 1891, belonged to the Evangelical Association belonged after that time to those who still constituted the association.
3. The assignment of K. to the R. church was made by a provisional body of adherents without ecclesiastical authority, and gave him no title; but the subsequent ratification of the assignment by the general conference gave him a title good from that date.
4. The assignment of S. was by an illegally organized body, and gave him no title, notwithstanding his reception by a majority of the members and officers of R. church. *Ib.*

The duly-appointed elder and the pastor of a voluntary religious association may join with members of the association in a suit to recover possession of the church and parsonage, and to enjoin the trustees and dissenting portion of the congregation from interfering with each in his ecclesiastical rights, and also to compel an accounting for collections taken up, which are payable to the elder and pastor as salary. *Fuchs v. Meisel*, 700.

How. St. (Mich.), § 4649, providing that any religious association, after exercising the privileges of a corporation for ten years, shall be presumed to have been legally organized, does not *per se* change such an organization by the lapse of time into a corporation. *Ib.*

How. St., § 4639, which provides that no ecclesiastical law or custom is to be recognized in the tenure of real estate, does not deprive members of a congregation of their right to compel the trustees to

CHURCH AND CHURCH PROPERTY—Continued.

permit the use of the church building according to the discipline and usages of the denomination. *Ib.*

The trustees of a congregation of the Evangelical Association, the chief characteristic of whose discipline is the itinerancy of its elders and preachers and power of the general conference to appoint the same, cannot, though supported by a majority of the congregation, deprive the duly-appointed elder and preacher of their ecclesiastical rights. *Ib.*

CONCEALMENT.

See ATTORNEY AND CLIENT. *Sutherland v. Reeve*, 1; FRAUD. *Texas Elevator and Compress Co. v. Mitchell*, 128.

CONDITIONAL DECREE.

See SPECIFIC PERFORMANCE. *Grand Tower & Cape Girardeau R. R. Co. v. Walton*, 211.

CONFIDENTIAL RELATIONS.

Where the relation of the parties is one of confidence, as that between mother and son, and the party executing the deed has a failing or weak mind arising from suffering or old age, the same degree of vigilance and care is not expected or required as is required in the ordinary dealings of men with each other, to authorize the reformation of a deed. The burden of proof is upon the party alleging the mistake to show the mistake is mutual. *Purvines v. Harrison*, 232.

Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one and to the detriment of the other party, the former will not be permitted to enforce the agreement, unless it appear that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement. *Graham v. Graham*, 646.

This rule applies in favor of a wife in respect to an ante-nuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. *Ib.*

CONSIDERATION.

The consideration of a deed is open to explanation upon an issue of fraud and undue influence in obtaining it. *Taylor v. Crockett*, 205.

A promise to pay taxes and to contribute to the support of the grantor, is held to be a sufficient consideration, in equity, to support the conveyance of the land in dispute in this case. *Ib.*

CONSIDERATION—*Continued.*

Where a corporation conveys all its property to another corporation, and receives from the latter, therefor, mortgage bonds on the property for the price, the transfer is not without consideration and void. *Fort Payne Bank v. Alabama Sanitarium*, 281.

CONSPIRACY.

See **INTERSTATE COMMERCE**. *United States v. Elliott*, 590.

CONTEMPT.

Pending an action for infringing a trade-mark, the plaintiffs are at liberty to warn the trade by circular; but to introduce discussion of the merits of the action is a contempt. *Coats v. Chadwick*, 608.

CONTEST FOR OFFICE.

See **INJUNCTION**. *People v. McClees*, 571.

CONTRACT.

See **SPECIFIC PERFORMANCE**. *Prospect Park & Coney Island R. R. Co. v. Coney Island & Brooklyn R. R. Co.*, 388, and see **EXECUTED CONTRACT**.

CORPORATE NAME.

The defendants were incorporated in Canada under the name of "The Sun Life Assurance Company of Canada," and, after carrying on business in Canada under that name for over ten years, they opened an office in London, and claimed the right to carry on business in this country under their corporate name.

In an action for injunction by an English company, who had carried on business in this country for more than eighty years under the name of "The Sun Life Assurance Society":

Held, (1) that, in the absence of fraud or dishonesty, the user by the defendants of their own corporate name without abbreviation, addition or other modification, involved no misstatement of fact, and could not, consistently with *Turton v. Turton*, 42 Ch. D. 128, be restrained by injunction; but *held*, (2) that the right of the defendants did not extend to the use of the name "The Sun" or "The Sun Life," without the addition of the words "of Canada." *Saunders v. Sun Life Assurance Co. of Canada*, 335.

COURT, SEAL OF.

See **CREDITOR'S BILL**. *Wehrman v. Conklin*, 441.

CREDITOR'S BILL.

Under § 2, c. 133, Code of West Virginia, a creditor, before obtaining judgment, may sue in equity to avoid a fraudulent transfer of his debtor's property, and if successful, has a lien from the commencement of his suit. *Guggenheimer v. Lockridge*, 379.

In December, 1859, the land, the subject of controversy in this suit, was patented to A. W. In the same month it was conveyed by

CREDITOR'S BILL—*Continued.*

A. A. and his wife to F. W. in an action founded upon a judgment obtained against him in a court in Wisconsin, which case proceeded to judgment against A. W. in September, 1861. Prior to levy of execution in that case, G., in a suit in equity against A. W. and F. W., obtained a decree declaring the deed to be void, and ordering the land to be sold in satisfaction of the judgment at law. Levy was made, the land was sold, and the sheriff made a deed conveying the property to G., who entered into possession, paid taxes, and in 1881, 1882 and 1884 conveyed the lands to C., who entered into possession and made valuable improvements upon them. For thirty years the taxes had been paid by C. and his privies in estate. F. W. having set up a claim to the property by reason of alleged irregularities in the proceedings by which G. acquired title, and having commenced an action in ejectment to enforce that claim, C. filed this bill in equity setting up the foregoing facts, averring that the deed by A. W. to F. W. was a cloud upon his title, and praying for a stay of the action of ejectment, for an injunction against further proceedings at law, and for a decree that C. held the lands free and clear from all claims of F. W. A demurrer was interposed, setting up, among other things, that the writ of attachment was not attested by the seal of the court; that no service of summons or notice was had upon A. W. in the state of Iowa; and other matters named in the opinion. The demurrer being overruled, answer was made, and a final decree was made in plaintiff's favor. *Held,*

1. That plaintiff had no adequate remedy at law, and the Circuit Court consequently had jurisdiction in equity;
2. That if no action in ejectment had been begun at law the long-continued adverse possession of the plaintiff and the equitable title set up in the bill would have been a sufficient basis for the maintenance of the suit;
3. That where title to real property is concerned equity has a concurrent jurisdiction, which affords more complete relief than can be obtained in a court of law;
4. That the bill was in the nature of a judgment creditor's bill, setting up defects of title against which they had a right to ask relief from a court of equity;
5. That it was immaterial whether the defects in the title of G. were well founded or not.
6. That the absence of the seal did not invalidate the writ. *Wehrman v. Conklin*, 441.

DELIVERY.

Giving the grantee manual possession of a deed tends to prove delivery, and, when unexplained, is sufficient to vest title, but it is not conclusive. *Rountree v. Smith*, 365.

DELIVERY—Continued.

Delivery of a deed may be actual, by doing something and saying nothing, or verbal, by saying something and doing nothing, or it may be by both; but it must answer to the one or the other or both these, and with intent thereby to give effect to the deed. *Ib.*

DISCLAIMER.

Where such a fraudulent deed is made, but is disclaimed by the grantee, equity has no jurisdiction of a suit brought after such disclaimer by a creditor of the grantor to subject the property to debt, in advance of judgment, merely because of such deed. *Guggenheimer v. Lockridge*, 379.

A deed is good between the parties without registry, as registry is only to protect subsequent purchasers from the grantor for valuable consideration, without notice, and creditors; and therefore the registry of a deed, without the knowledge or consent of the grantee, will not bar him from disclaiming it. *Ib.*

EMINENT DOMAIN.

Where a railroad company is authorized to take private property for a public use under its charter, the mode of procedure in Illinois is laid down in the statute entitled "Eminent Domain." The proceeding is one in law, and not in equity. *Grand Tower & Cape Girardeau R. R. Co. v. Walton*, 211.

See JURISDICTION. *Ib.*

ENGAGED PERSONS.

See CONFIDENTIAL RELATIONS. *Graham v. Graham*, 646.

ESTOPPEL.

To constitute an estoppel by conduct the person whom it is sought to estop must have done some act or made some admission which has influenced the action of the other party. *Rigney v. Tacoma L. & W. Co.*, 47.

The plaintiff is not estopped by an averment in his petition, immaterial at that stage of the pleadings. Notwithstanding such immaterial averment, he may, in his reply, aver a different state of facts. *Holtry v. Foley*, 83.

A judgment debtor, who accepts a release fraudulently procured by another, with a full knowledge of the fraud, cannot deny the agency of the other in procuring the release. *Texas Elevator and Compress Co. v. Mitchell*, 129.

EVIDENCE.

In a proceeding to set aside an assignment of judgment against a corporation, it appeared that the plaintiff was misled by newspaper reports that this judgment had been reversed and remanded, when, in fact, it had been affirmed; that a majority holder of

EVIDENCE—*Continued.*

stock in the corporation had a copy of the opinion procured by his agent, who immediately entered into negotiations with the plaintiff for the purchase of the judgment with money provided by the stockholder; that after making the purchase the agent released the judgment without consideration; and that certain bonds deposited by the corporation to secure its bondsmen on appeal were released and sent to such stockholders. *Held*, testimony that the broker whom the agent employed to negotiate the assignment, represented himself as agent of the defendant was admissible. *Texas Elevator and Compress Co. v. Mitchell*, 129.

Where parties have reduced their contract to writing, the rule is well settled that parol evidence is not admissible to vary or change the terms of the contract, but where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose. *Grand Tower & Cape Girardeau R. R. Co. v. Walton*, 211.

In an action to correct a contract for the purchase of lumber, by including land omitted therefrom by mistake, where the vendee has made a payment under the contract, and has commenced to remove lumber from the land therein described, oral evidence is admissible to show that it was the intention of the parties to include the land claimed to have been omitted. *Metropolitan Lumber Co. v. Lake Superior Ship Canal, Ry. & Iron Co.*, 226.

It is well settled that parol proof may be received to show a mistake in a deed, or other written instrument. The mistake may be shown by the admissions of the party in whose favor it has been made. *Purvines v. Harrison*, 232.

See CONSIDERATION. *Taylor v. Crockett*, 205.

EXECUTED CONTRACT.

Where the parties are in *pari delicto* an executed contract will not as a general rule, be set aside because of want of authority to make it. *Cincinnati, Hamilton & Dayton R. R. Co. v. McKeen*, 399.

In May, 1887, complainant's board of directors authorized its vice-president, I., to buy 20,000 shares of the stock of the T. & I. Railroad Co., and directed the sale of certain stock of the D. & M. Railroad Co., owned by complainant, to provide funds for the purchase, which stock was accordingly sold. June 1, 1887, I., "trustee," entered into an agreement with defendant, by which defendant agreed to sell to I. 11,160 shares of stock of the T. & I. Railroad Co. and 4,446 shares of stock of the T. & L. Railroad Co., to deliver 8,560 shares of the T. & I. stock and all the T. & L. stock on June 4, and the remainder of the T. & I. stock in thirty days, and acknowledge the receipt of \$250,000 from I., who agreed, on June 4, to pay \$639,500 and execute his note for \$669,150 with the stock purchased as collateral. On June 4 the stock was

EXECUTED CONTRACT—Continued.

delivered by defendant, and the money paid and note and collateral delivered by I. and a receipt signed by both parties acknowledging the receipt of stock, money and notes. Within thirty days defendant delivered the remainder of the stock. June 21 a meeting of complainant's stockholders ratified the sale of the D. & M. stock, with knowledge of the purpose of the sale, I. having been displaced as an officer of complainant, the board of directors passed two resolutions referring to the T. & I. stock, and treating it as the property of complainant, and subsequently brought two suits, before the present one, seeking relief based upon complainant's ownership of that stock. Upon this bill, alleging that the funds paid to defendant by I. belonged to complainant, and seeking to set aside the contract of June 1 as *ultra vires* the complainant, to declare defendant a trustee of complainant of the \$889,500 paid him by I., and to cancel the note given by I., *held*, that the contract had been fully executed; and both parties being equally chargeable with the notice of its illegality, and no circumstances of oppression or fraud on defendant's part being established, it would not be set aside, nor would the note be canceled, the illegality of the contract being a complete defense at law, and the note being overdue at the commencement of this suit. *Ib.*

FRAUD.

In an action to rescind a contract for the sale of stock in a corporation because of fraudulent representations inducing the contract, the representation proved was that a report of the secretary of the corporation showed that it was earning a profit of two per cent. per month. The report referred to did show what was represented, but the report was false, and the defendant knew that it was false. *Held*, that the defendant thereby adopted the report as his own statement, and was responsible to the same extent as if he had represented the profit to be in fact as it was shown by the report. *Holtry v. Foley*, 83.

A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Ib.*

The fact that the plaintiff made inquiries elsewhere which did not disclose the falsity of the representations is no defense. The plaintiff is entitled to relief if the representations were a material inducement to the contract, although he may have made efforts to discover the truth thereof and did not rely wholly upon the veracity of the defendant. *Ib.*

Where a person who has a good education executes a mortgage without reading it, or requesting that it be read, supposing that it is a "lien" of some kind different from a mortgage, and is induced to

FRAUD—Continued.

execute it by the false representation of a third person that it is not a mortgage, and that they "could do away with it in thirty days," the mortgage is not void in the hands of an innocent purchaser. *Medlin v. Buford*, 105.

One who, being about to purchase from another, knows that the vendor has been deceived as to material facts affecting the value of the subject of sale by untrue reports given to him by third persons, and nevertheless, without informing the vendor of the truth, purchases for an inadequate consideration, is guilty of such fraud as will entitle the vendor to relief by rescission. *Texas Elevator and Compress Co. v. Mitchell*, 128.

The above rule applies to the assignment of a judgment. Relief will be given, as against actual fraud in procuring the assignment of a judgment, although it may not appear that the assignee had any right to rely upon the representations of the assignee by reason of the existence of any fiduciary relation between the two. *Ib.*

A testator devised lands to the city of Superior before it was incorporated. Some of the heirs quit-claimed their interests therein, for \$100 each, to the defendant, a son-in-law of their uncle, who was to contest the validity of the devise, and if successful was to pay each \$300 more. Had their title been unquestioned their interests would have been worth much more, but were then not marketable. The devise was afterwards adjudged void. It appearing that the grantors were not induced to make the deed by any misrepresentation, concealment or undue influence, that at the time they were anxious to sell, and they knew the state of the title as well as the defendant did, and knew, also, that he depended entirely upon the contingency of success in the proposed legal proceedings to secure any interest in the lands, through their deed, *held*, that they were not entitled to have the deed set aside on the ground of fraud. *Allen v. Brooks*, 191.

The evidence in this case held to show that a conveyance by an heir of his interest in the estate of his ancestor, made in ignorance of the value of lands devised by the ancestor for public parks and of an arrangement for contesting the validity of the devise, was induced by concealment, deceit and misrepresentation, and should be set aside. *Dean v. Brooks*, 197.

Where an agreement to convey a strip of land for a railroad right of way over certain lands, fixing no definite line, was procured to be executed upon the representations and promises of the agents of the road that the road should be located along a definite and fixed line and along the bank of a slough, and, after the agreement to release the right of way was executed, the promises and representations were disregarded and the road was built on a different route, it was held that, owing to the fraud practiced by the railway company, a court of equity would not decree specific per-

FRAUD—Continued.

formance of the agreement, and that a cross-bill setting up fraud was not without equity. *Grand Tower & Cape Girardeau R. R. Co. v. Wallon*, 211.

Plaintiffs conveyed a farm to defendant, their grandson, in consideration of his agreement to provide for them every comfort and necessary as long as they lived. Plaintiffs were old and feeble, and were induced to convey by defendant's declarations of his anxiety to relieve them from the care of the farm, and his statements that he was well off, and would give them a nice home in Chicago. He was not well off, and did not give them a home in Chicago, but sent his parents and sister to live with them on the farm. The latter regarded the change as made for their comfort, and not that of plaintiffs, whom they abused, and whose work and care they added to. *Held*, that the conveyance was rightly set aside. *Rexford v. Schofield*, 257.

Where the stockholders and officers of an insolvent corporation convey all its property to another corporation in consideration of mortgage bonds issued by the grantee on the property, and, without providing for the debts, divide the bonds, *pro rata*, among themselves, such transfer is a fraud on the creditors of the grantor, though such creditors knew of and acquiesced in the transfer at the time; and such creditors may set it aside, whether the grantee be a stranger to the grantor, or a new corporation formed by the shareholders of the latter. *Fort Payne Bank v. Alabama Sanitarium*, 281.

When the beneficiary of a deed of trust conveying "all the property used or acquired in carrying on" a tannery, permits the grantor to buy, sell and ship the leather or other products of the business in his own name, the deed becomes void as against the grantor's creditors. *Bank of Iuka v. Doan*, 355.

See ATTORNEY AND CLIENT. *Sutherland v. Reeve*, 1; CONSIDERATION. *Taylor v. Crockett*, 205; BURDEN OF PROOF. *Smith v. Snowden*, 251; PREFERENCE BY DEBTOR. *Murray v. Heard*, 146; TRADE NAME. *Millbrae Co. v. Taylor*, 34.

FRAUDULENT CONVEYANCE.

Binding on grantor. See RESCISSION. *Pride v. Andrews*, 266; as affecting jurisdiction, see JURISDICTION. *Guggenheimer v. Lockridge*, 379.

GIFT.

Deceased brought to the office of one S. a packet of notes, and handed it to S., to collect the notes, or, if necessary, to renew them in the name of deceased's wife, and to account to her, saying that he had given them to her, that they were hers. He left the office, but, before reaching the street, came back, and asked for one of

GIFT—*Continued.*

the notes, saying that he wanted to see the maker about it. He took the note, and at once gave it to a young man, stating that the latter had been kind to him, and being just married, needed it. He had before spoken to others of his gratitude to this man, and afterwards mentioned to others this gift and his reasons for making it. *Held*, that though the delivery to S. was to him as the wife's trustee, and the gift to her so far complete, it was not so specific, as to that one note, as to invalidate the revocation or correction of mistake, and the subsequent gift. *Marshall v. Russell*, 560.

HUSBAND AND WIFE.

See PREFERENCE BY DEBTOR. *Murray v. Heard*, 146.

IMPROVEMENT.

See PATENT. *Allison Bros. Co. v. Allison*, 422.

INJUNCTION.

A taxpayer has a right to file a bill to enjoin the waste of public moneys. *Avery v. Job*, 66.

Though the purchase or erection of water-works be a matter within the discretion of the city council, yet equity will, at the suit of taxpayers, restrain their purchase, for \$28,000, of works worth only \$10,000, and inadequate and unsuited to the purpose. *Ib.*

Where a city charter authorized the council to buy or build and conduct water-works, and to that end to issue and sell bonds to a certain amount, whereby the city shall be deemed to promise to pay to bearer the sum named, with interest; to establish and collect water rates, whose proceeds shall be kept as a separate fund, and only used for expenses and improvements on the works and interest on the bonds, all the surplus to go to a sinking fund to pay the principal when due, the sinking-fund clause having no express provision to the contrary, the city is generally and primarily liable for the payment of such bonds, and resident taxpayers have the right to sue to enjoin their improper issue. *Ib.*

An appeal may be taken from a preliminary injunction. *Andrews v. National Foundry and Pipe Works*, 542.

A decision on appeal, reversing an order granting a temporary injunction, is conclusive only of the rights of the parties upon the showing made in support of the order. *Ib.*

The writ of injunction which the Constitution of Colorado authorizes the Supreme Court to issue in the exercise of its original jurisdiction is a jurisdictional writ, as contradistinguished from the ordinary writ of injunction in aid of jurisdiction otherwise acquired. *People v. McClees*, 571.

To warrant the Supreme Court in taking jurisdiction in an original proceeding by injunction, the case made by the complaint must not only show equitable ground for relief, but must disclose a

INJUNCTION—Continued.

question involving the rights or franchises of the state in its sovereign capacity—that is, public rights or interests, as contradistinguished from matters of private or individual concern. *Ib.*

Where the Supreme Court was asked, in the exercise of its original jurisdiction, to issue a writ of injunction to restrain the secretary of state from delivering certificates of election to certain persons elected as district judges, the injunction being asked on the ground that the terms of the incumbents of such judicial offices were not about to expire, *held*, that the real question in controversy was the question of title to public offices between the individual claimants; that the controversy did not involve the rights or franchises of the people, or the rights of the state in its sovereign capacity, and so the writ was denied. *Ib.*

An injunction will not be issued at the suit of a taxpayer to restrain the officers of a municipality *de facto* from collecting taxes, on the ground that it has no legal existence as a municipal corporation. *Troutman v. McCleskey*, 587.

See WATER-COURSE. *Rigney v. Tacoma L. & W. Co.*, 47; INTERSTATE COMMERCE. *United States v. Elliott*, 590.

INTERSTATE COMMERCE.

A combination by railroad employes to prevent all the railroads of a large city engaged in carrying the United States mails and in interstate commerce from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads, is within the Act of July 2, 1890, § 1, which provides that every contract, combination in the form of trust or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal. *United States v. Elliott*, 590.

The Act of July 2, 1890, § 4, which provides that the Circuit Courts of the United States have jurisdiction to restrain combinations and conspiracies to obstruct and destroy interstate commerce, before such objects are accomplished, is not void for want of power in Congress to authorize such proceedings. *Ib.*

Under the Act of July 2, 1890, § 5, an injunction order in an action to enjoin an illegal conspiracy against interstate commerce may provide that it shall be in force against defendants not named in the bill, but who are within the terms of the order, where it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them. *Ib.*

JUDGE.

Effect of finding by. See PRACTICE. *Taylor v. Crockett*, 205.

JUDGMENT.

When a judgment is given by a court, the fact that, by an error of the clerk, it is entered in the wrong book will not render the judgment so far void as to require the dismissal of an appeal therefrom, and *semble* such judgment is valid as between the parties.

Wolf v. Great Falls Water Power and Town Site Co., 154.

See FRAUD. *Texas Elevator and Compress Co. v. Mitchell*, 128; LACHES.

Wolf v. Great Falls Water Power and Town Site Co., 154.

JURISDICTION.

A bill, by a legatee against an executor, to recover a legacy claimed by him to be void under the state law, is within the equitable jurisdiction of the federal courts. *Domestic and Foreign Missionary Society v. Gaither*, 113.

While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes where a bill is filed for that purpose alone, yet where the land-owner has been brought into a court of equity by a railroad company, after it has taken and appropriated the lands for its purposes, and it prays for a decree requiring the land-owner to convey the lands thus taken, the latter may insist upon being paid for the land taken and damaged, and ask the court, by cross-bill, to have the amount ascertained and determined by a jury to be selected for that purpose. *Grand Tower & Cape Girardeau R. R. Co. v. Walton*, 211.

Where a railway company has a valid contract for a deed for its right of way, a court of equity is the appropriate tribunal to decree a deed in pursuance of the contract. And when such relief is sought by an original bill, the land-owner may file his cross-bill, charging fraud in procuring the agreement upon which the company seeks a decree of specific performance. *Ib.*

Where a cross-bill is filed in a suit for the specific performance of a contract to make a deed, and the defendant files his cross-bill charging that the contract was procured by fraud and false promises and representations, this will clothe the court of equity with authority to adjudicate upon these matters; and such court will have the right, if necessary, to do complete justice between the parties, and to settle and determine legal as well as equitable rights. In other words, when equity acquires jurisdiction it will retain the case, and settle all questions incident to the relief sought by the bill. *Ib.*

It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law of questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished. *Ib.*

After a grantee in a fraudulent conveyance has reconveyed the property to the debtor (grantor), equity has no jurisdiction of a suit

JURISDICTION—Continued.

by a creditor to subject the property, in advance of lien by judgment or otherwise, merely because of such fraudulent conveyance. *Guggenheimer v. Lockridge*, 379.

A transfer from one joint debtor to another will not give equity jurisdiction to entertain a suit by that creditor of the grantor, in advance of lien by judgment or otherwise, to subject the property to his debt. *Ib.*

A federal court is not given jurisdiction to settle a decedent's estate in equity, after the English practice, by the mere fact that the citizenship of the parties gives jurisdiction to the federal courts; it cannot, therefore, entertain in equity what is a strict legal claim merely because the defendant is an administrator and the plaintiff a citizen of a state other than that of the defendant. *Walker v. Brown*, 630.

Under the Constitution of 1890, § 147 of the state of Mississippi, which provides that no judgment or decree shall be reversed or annulled on the ground of want of jurisdiction, based on a mistake as to whether the cause was of equity or common-law jurisdiction, the appointment by a chancery court of a receiver for the property of a bank, where the bank has abandoned it, at the suit of a general creditor cannot be attacked on the ground that the creditor should first have obtained a judgment at law. *Whitney v. Hanover Nat. Bank; Same v. Bank of Greenville*, 658.

LACHES.

The defense of laches, by reason of lapse of time and inaction of the party seeking relief, will not be permitted where the party was in ignorance of the material facts connected with the transaction which is attacked or of his rights in relation thereto. *Sutherland v. Reeve*, 1.

The effect of delay in depriving a plaintiff in equity of the right to maintain his suit is confined to claims for purely equitable remedies, to which the party has no legal right; where it is sought to sustain a legal right, mere delay, unaccompanied by circumstances amounting to an estoppel, for a time short of the period fixed by the statute of limitations, will not defeat a bill for an injunction. *Rigney v. Tacoma L. & W. Co.*, 47.

When during violations of plaintiff's right by a defendant the former is told by the latter that the violations are temporary only, the plaintiff cannot be charged with laches in not bringing suit, although the delay be long continued. *Ib.*

Laches of plaintiff may act as a bar to the enforcement of specific performance of a contract although the statutory period of limitation has not elapsed. *Wolf v. Great Falls Water Power and Town Site Co.*, 154.

Where a vendee does not bring suit for the specific performance of

LACHES—Continued.

a contract of sale of a town lot until three and a half years after the vendor has refused to carry out his part of the contract and taken possession of the lot which was the subject thereof, such delay, if unexplained, is such laches as will bar the vendee's right to relief by way of a decree for specific performance. *Ib.*

It is no defense to an action to correct a contract for the purchase of lumber, by including land omitted therefrom by mistake, that the action was not commenced until some time after the discovery of the mistake by the vendee, when immediately on its discovery the vendee notified the vendor that he intended to insist on his right to the land omitted, and no injury was caused to the vendor by the delay. *Metropolitan Lumber Co. v. Lake Superior Ship Canal, Ry. & Iron Co.*, 226.

A court of equity in the exercise of its inherent power to do justice between parties will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations. *Alsop v. Riker*, 507.

The length of time during which a party neglects the assertion of his rights which must pass in order to show laches in equity, varies with the peculiar circumstances of each case and is not subject to an arbitrary rule. *Ib.*

LEGACY.

See JURISDICTION ; UNCERTAINTY. *Domestic and Foreign Missionary Society v. Gauthier*, 113.

LIEN.

See REMEDY AT LAW. *Walker v. Brown*, 630.

LIMITATION OF ACTIONS.

The statute of limitations is applied in equity only by analogy to the limitations at law, and a court of equity will not apply the statute when it would be inequitable to do so. The limitation of five years will not be applied to a bill to set aside an order obtained by fraud, while the original cause is still pending. *Sutherland v. Reeve*, 1.

MISTAKE.

To justify the reformation of a written instrument upon the ground of mistake, it is necessary, first, that the mistake should be one of fact and not of law ; second, that the mistake should be proved by clear and convincing evidence ; and third, that the mistake should be mutual and common to both parties to the instrument. *Purvines v. Harrison*, 232.

A mistake of law is an erroneous conclusion as to the legal effect of known facts, the construction of words being a matter of law. Where parties instruct a draughtsman to prepare a quit-claim deed for their execution, but he draws a deed containing language

MISTAKE—Continued.

which amounts in law to a covenant of title in fee and they sign the deed knowing that such language is in it, they will be held to have been mistaken in the law, that is to say, in the legal effect of the language used and in the legal consequences of retaining such language in the deed. *Ib.*

Mistake of fact has been defined to be a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in an unconscious ignorance or forgetfulness of a fact past or present, material to the contract, or belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of a thing which has not existed. *Ib.*

MORTGAGE.

Two things are indispensably requisite to render a transfer of property, absolute upon its face, a mortgage: First, the transfer must be made to secure the payment of a debt or the performance of a duty; and, second, a right of redemption must exist in the mortgagor. *Strieby v. Clinton Hill Lumber and Manufacturing Co.*, 530.

A water company mortgaged, with covenants of warranty, "all the rights, privileges, immunities, franchises and powers which were granted in and by" a certain city ordinance. *Held*, that the mortgage covered all franchises owned by the company and enumerated in said ordinance, whether the same were in fact granted by the city or by the state. *Andrews v. National Foundry and Pipe Works*, 542.

See REFORMATION. *Walls v. State*, 241; FRAUD. *Medlin v. Buford*, 105; PURCHASER WITHOUT NOTICE. *Dixon v. Wilmington Saving and Trust Co.*, 110.

MOTHER AND SON.

See CONFIDENTIAL RELATIONS. *Purvines v. Harrison*, 232.

MULTIFARIOUSNESS.

A bill which charges that defendants have usurped control of a church edifice and funds, whereby certain of the plaintiffs are deprived of pastoral rights and emoluments and others of the use of the church for the purpose of worship according to the rules of a particular denomination is not multifarious. *Fuchs v. Meisel*, 700.

MULTIPLICITY OF ACTIONS.

See REMEDY AT LAW. *Druon v. Sullivan*, 536.

MUNICIPALITY.

A city whose charter gives it "the general powers possessed by municipal corporations at common law," and also gives it express

MUNICIPALITY—Continued.

power "to provide for the erection of water-works," has power to grant to a corporation a franchise to supply the inhabitants of the city with water. *Andrews v. National Foundry and Pipe Works*, 542. The question of the validity of a municipal corporation, which has apparently a legal existence, is determinable only by *quo warranto* proceedings. *Troutman v. McCleskey*, 587. See INJUNCTION. *Avery v. Job*, 66.

OYER.

See PRACTICE. *Hamilton v. Downer*, 522.

PATENT.

The word "improvement," referring to a patented machine or process, does not include a new and independent invention, although used for the same purpose as the first-mentioned machine or process. *Allison Bros. Co. v. Allison*, 422.

An assignment of a patent "and improvements on the same which may hereafter be made" does not include a patent subsequently granted to the assignor for a machine to manufacture, by a different process, the same goods as were produced by the machine covered by the patent assigned, but which can be used without any of the machinery included in the earlier patent, and without infringing thereon. *Ib.*

PAYMENT.

See BURDEN OF PROOF. *Pearce v. Walker*, 613.

PENALTY.

Equity will not actively aid in the enforcement of a penalty or a forfeiture. *Worthington v. Moon*, 77.

PLEADING.

See ESTOPPEL. *Holtry v. Foley*, 83.

POWER OF ATTORNEY.

The rule that a power to sell includes a power to mortgage does not apply to a mere letter of attorney with a naked authority to sell, uncoupled with any interest in the land or fund. *Campbell v. Foster Home Assn.*, 472.

By an instrument in writing the owner of land constituted and appointed another person her true and lawful attorney for her and in her name "to grant, bargain and sell in fee simple all real estate owned by her, including all ground-rents, on such terms and for such prices as he may see fit, and to make, execute and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties or with said ground-rents." *Held*, that the attorney-in-fact had no power to execute a bond and mortgage in the name of his principal. *Ib.*

POWER OF ATTORNEY—Continued.

Letters of attorney are strictly interpreted, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect. *Ib.*

PRACTICE.

When a court amends a judgment on motion of the defendant and denies a new trial, an appeal by the defendant from the original judgment and from the denial of the new trial will not in Montana be dismissed on the ground that it should have been from the amended judgment, as the appeal from the order denying the new trial brings up the entire case. *Wolf v. Great Falls Water Power and Town Site Co.*, 154.

In cases in equity the Supreme Court, on appeal, will review the facts; but, where the result turns upon the credibility of conflicting evidence, the court is disposed to give great weight to the findings of the trial judge. *Taylor v. Crockett*, 205.

In an action against such corporations, stockholders, etc., to set aside a fraudulent transfer, where the bill is sufficient, and there is a prayer for general relief, and decrees *pro confesso* are entered against several stockholders of the grantor corporation, it is error to dismiss the bill, as to them, on final hearing, though the evidence is insufficient to support the bill, as to the answering respondents. *Fort Payne Bank v. Alabama Sanitarium*, 281.

In Massachusetts on appeal from the decree of a single justice, the parties cannot, without his sanction, add to or diminish the record. *Com'th v. Suffolk Trust Co.*, 350.

The practice of allowingoyer is unknown in chancery, but the improper allowance of it under the facts of this case is not such error as to reverse the decree. *Hamilton v. Downer*, 522.

The defense of the statute of frauds, against an oral contract to convey land, can be made on demurrer only when it affirmatively appears from the bill that the agreement relied on is not evidenced by a writing signed. *Ib.*

A preliminary injunction made upon a *prima facie* showing is an "interlocutory order" of injunction, from which an appeal to the Circuit Court of Appeals will lie: *Richmond v. Atwood*, 5 U. S. App. 151, 2 C. C. A. 596, and 52 Fed. 10. *Andrews v. National Foundry and Pipe Works*, 542.

One cannot be made a defendant to a bill in equity on his own application, against the objection of the complainant. *Whitney v. Hanover Bank*; *Same v. Bank of Greenville*, 658.

See STOCKHOLDER, SUIT BY. *Bell v. Montgomery Light Co.*, 434.

PREFERENCE BY DEBTOR.

An insolvent or failing debtor may, in the payment of his debts, prefer one creditor above another, and the mere fact that a pre-

PREFERENCE BY DEBTOR—*Continued.*

ferred creditor is the wife of the debtor does not avoid the preference, where the testimony shows the *bona fides* of the consideration, in discharge of which the preferential conveyance is made, and that the property is taken at a fair valuation. *Murray v. Heard*, 146.

PURCHASER.

See CHOSE IN ACTION. *Sutherland v. Reeve*, 1.

PURCHASER WITHOUT NOTICE.

The fact that a mortgagor is induced by fraudulent representations to sign a mortgage without reading it renders it voidable merely, and therefore cannot be avoided in the hands of a person who in good faith advances money thereon. *Dixon v. Wilmington Saving and Trust Co.*, 110.

One who takes a conveyance and assumes the payment of any mortgage to the school fund of a state upon the land of which he is grantee, knowing at the time that his deed covers the only land owned by the mortgagor, and that there is a school-fund mortgage in the mortgagor's name, the description of which differs from the description in the deed, cannot successfully defend against a proceeding to reform the mortgage by correcting the description so as to make it conform with the land owned by the original mortgagor, on the ground that he is a *bona fide* purchaser without notice. *Walls v. State*, 241.

QUIETING TITLE.

The general principles of equity jurisprudence, as administered in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the title of the plaintiff have been established by at least one successful trial at law. *Wehrman v. Conklin*, 441.

The statutes of Iowa (Code, § 3273) having enlarged the jurisdiction of the courts of equity of that state by providing that "an action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," such enlarged jurisdiction, if sought to be enforced in a federal court, sitting within the state, can only be exercised subject to the constitutional provision entitling parties to a trial by jury, and to the provision in Rev. Stat., § 723, prohibiting suits in equity where a plain, complete and adequate remedy be had at law. *Ib.*

QUO WARRANTO.

See MUNICIPALITY. *Troutman v. McCleskey*, 587.

RECEIVER.

A complaint in an action by the receiver against the former cashier of an insolvent corporation, which alleges that defendant, in the course of his agency, received into his possession, of the funds of the corporation represented by the receiver, a certain amount, and that he accounted for and turned over to his successor a less amount, and that demand has been made upon him for the balance which went into his hands, and he has failed to pay it over to the receiver, states a cause of action. *Dunn v. Johnson*, 625.

In the absence of statutory authority the appointment of a receiver for a bank on its *ex parte* application is void, and therefore can be assailed collaterally. *Whitney v. Hanover Nat. Bank*; *Same v. Bank of Greenville*, 658.

REFORMATION.

Where a woman employed a scrivener to draw a deed from her to her son to convey to him a tract of land with a reservation of a life estate in her, and it appeared that the conveyance was a gift and that the mother reposed great confidence in the son, and that by inadvertance or mistake, the words reserving a life estate were omitted so as to convey the land absolutely in fee and that the son in his lifetime, on discovery of the mistake, promised to correct the deed, it was held that a court of equity would reform the deed so as to reserve to the grantor a life estate. *Purvins v. Harrison*, 232.

A mortgage may be reformed and foreclosed against a subsequent purchaser with notice of the mistake on account of which reformation is sought. *Walls v. State*, 241.

A complaint in an action to reform and foreclose a mortgage need not allege a demand for reformation before bringing action. *Ib.*

An instrument apparently full and carefully drawn and formally executed will not be reformed so as to cover property not described therein on the uncorroborated evidence of two of the parties thereto as to statements by the other party, where the latter explicitly denies having made the statements. *Allison Bros. Co. v. Allison*, 422.

The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake. *Burrtown Land and Town Co. v. Handy*, 463.

Where a grantee purchased from a grantor a fractional eighty-acre tract of land subject to the right of way of the Union Pacific Railway Company, which, under an Act of Congress, was four hundred feet in width, but the parties did not actually know the width of the right of way, and the conveyance, without conform-

REFORMATION—*Continued.*

ing to the intent of the parties, included the right of way with covenants of general warranty, *held*, that the grantor was entitled to have the deed reformed so as to except therefrom the right of way, to which he had no title. *Ib.*

See LACHES. *Metropolitan Lumber Co. v. Lake Superior Ship Canal, Ry. & Iron Co.*, 226; MISTAKE. *Purvines v. Harrison*, 232.

REGISTRY.

See DISCLAIMER. *Guggenheimer v. Lockridge*, 379.

REMEDY AT LAW.

In an action against a firm by judgment creditors to set aside, as fraudulent, an assignment for the benefit of creditors and for the appointment of a receiver, the complaint alleged that plaintiff's executions had been returned unsatisfied, that the assignment contained an illegal preference, that, unless prevented by the court, the assignee would turn over the property to the preferred creditors, that the assignee was insolvent. *Held*, that the complaint was not demurrable on the ground that plaintiffs had an adequate remedy at law. *Ottensburg v. Barnes*, 100.

A receipt was given by the orator for money left with him in trust by a father for his two children. The orator became indebted to the father, and gave a note covering the money specified in the receipt and the additional debt, and paid the note in full to the father's administrator. The receipt was not surrendered, and the children brought separate actions, returnable in different counties, for the money specified therein. *Held*, (1) that as the orator had a remedy at law in the actions pending, equity jurisdiction to decree cancellation would not be exercised; (2) that the cases at bar presented no such multiplicity of suits as to require equitable interference on that ground. *Druon v. Sullivan*, 536.

Where one who has loaned bonds to a firm writes to a prospective creditor thereof "The loan of \$15,000, Memphis bonds, made by me to Mr. J. C. L. for the use of Messrs. L. & Co. . . . is with the understanding that any indebtedness they may be owing you at any time shall be paid before the return to me of these bonds, or the value thereof, or that these bonds or the value thereof, are at the risk of the business of L. & Co., so far as any claim you may have against said L. & Co. is concerned," he does not create a lien on the bonds themselves, as he may at any time take them back by paying their value to the firm. *Walker v. Brown*, 631.

Where, in violation of such an agreement as is above recited, bonds are taken back by their owner without replacing them by their value, the creditor's remedy is at law by an action for breach of contract, and not in equity. *Ib.*

REPRESENTATION.

See FRAUD. *Holtry v. Foley*, 83; *Texas Elevator and Compress Co. v. Mitchell*, 128.

RESCISSION.

A father executed to his children, one of whom was a married woman, a deed of all his property and received a deed conditioned for his support and for reconveyance on payment of expenses incurred. The latter deed was void, having been signed by the married daughter without being joined by her husband. No support was furnished, and defendants refused to reconvey. *Held*, that equity would not compel defendants to execute a proper deed, but would consider the former deed voidable at the instance of the grantor, if the rights of third parties were not affected. *Chapman v. Long*, 262.

Where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another, with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he cannot, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey to him the property. *Pride v. Andrews*, 266.

See FRAUD. *Holtry v. Foley*, 83.

RESTRAINT OF TRADE.

A contract by which three of four companies in New England, engaged in the manufacture of oleomargarine, consolidate as a corporation, partly for the purpose of stopping the sharp competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as constituting a monopoly. *Oakdale Mfg. Co. v. Garst*, 296.

Citizens of one state may form a corporation under the laws of another state to do business in the state of their citizenship. *Ib.*

An agreement by persons, forming a corporation under which they shall unite their business of manufacturing oleomargarine, that none of them shall separately engage in the business for five years, without any limitation as to territory, they having in contemplation an extensive business, which should include the building up of a foreign trade, is not an unreasonable restraint of trade. *Ib.*

The defendant, who had been carrying on the business of a grocer, under the style of "T. P. Hancock," sold the business to the plaintiff, and entered into an agreement not to "carry on or be in anywise interested in" any similar business within a specified area. About seven years later the wife of the defendant, desiring (against his wishes) to start her nephew in business, opened a grocer's shop within the specified area, and carried on business

RESTRAINT OF TRADE—Continued.

there under the style of "Mrs. T. P. Hancock." The business was managed by the nephew, and the defendant's wife took some part in carrying it on; but the defendant took no part. The money necessary for starting the business was found by the wife out of her separate estate, and no money whatever was contributed by the defendant, either towards starting the business or carrying it on, nor did he share in the profits in any way. He, however, introduced his wife to his bankers, where she opened an account in her own name, assisted her in obtaining the lease of the shop in her own name, introduced the nephew to the wholesale merchants who had supplied the old business, and, as his wife was disabled by rheumatism from writing, wrote for her a circular, inviting "old friends" to come to the shop. He also handed copies of the circular to some few persons, including a tenant of his own.

Held, that there had been no breach of the agreement by the defendant. *Smith v. Hancock*, 305.

RESTRICTIONS.

The legislature, after authorizing a religious body to hold land for a specified purpose, may remove the restrictions upon the use of the land. *Gump v. Sibley*, 22.

REVOCATION.

See **GIFT**. *Marshall v. Russell*, 560.

RIPARIAN OWNER.

See **WATER-COURSE**. *Rigney v. Tacoma Light and Water Co.*, 47.

SETTLEMENT OF ESTATES.

See **JURISDICTION**. *Walker v. Brown*, 630.

SPECIFIC PERFORMANCE.

Specific performance may be decreed of a contract to convey land at the request of a lessee, where such contract is part of an agreement to lease the said land. *Waters v. Bew*, 183.

Under an agreement for the sale of land the purchaser is entitled to a deed describing the land in the words of the agreement, and no limitation can be superadded. *Ib.*

Specific performance of an agreement to convey land will not be refused on the ground of uncertainty of contract, because the agreement contains a condition that there shall be reserved to the grantor a right of way, which way is not located by the agreement, for the grantor has the right to designate the way in his deed. *Ib.*

Plaintiff and defendant companies owned competing street railroads in the city of Brooklyn, extending to Coney Island. Plaintiff's

SPECIFIC PERFORMANCE—*Continued.*

line from C. depot, at N. avenue and Twentieth street, was a steam railroad. All the other lines were horse railroads. The companies agreed, in 1882, that defendant should run cars for twenty-one years over plaintiff's track from defendant's road at N. avenue and Fifteenth street to C. depot, and that, if defendant should use "steam as a motive power" from N. avenue and Fifteenth street to Coney Island, either party could terminate the contract. Subsequently, the defendant established an electric railway line over the route named and refused to run cars over the line of the plaintiff, which brought an action to compel specific performance of the contract of 1882. *Held*, that the words "steam as a motive power" did not mean rapid transit, by whatever means accomplished, so as to entitle defendant to terminate the contract on the use by it of electricity as a motive power on its road from N. avenue and Fifteenth street to Coney Island, or disentitle plaintiff to specific performance. *Prospect Park & Coney Island R. R. Co. v. Coney Island & Brooklyn R. R. Co.*, 388.

When such a contract was made, plaintiff owned certain franchises for horse railroads, which, if constructed, would compete with defendant's roads, and some of which the defendant had endeavored to purchase from the plaintiff. Three years afterwards plaintiff leased such franchises, and, two years thereafter, sold them to the A. Company, which constructed a road from C. depot to H. ferry, which competed with defendant's road, and injured its business. Defendant did not object to such transfer until after its refusal to perform its contract with plaintiff, four years after the sale. *Held*, that such transfer by plaintiff did not render it inequitable to enforce specific performance of its contract with defendant. *Ib.*

The contract did not impliedly prohibit plaintiff from selling such franchises to a purchaser who would not have the same motive to deal fairly with defendant that plaintiff had while seeking to build up its Coney Island business. *Ib.*

A failure on the part of plaintiff and its grantee to substantially perform the provisions of the contract in regard to defendant's terminal facilities at C. depot, would not be a defense to an action for specific performance, since defendant could have enforced its contract rights by resort to the courts. *Ib.*

The fact that changed circumstances, creating active competition between plaintiff and defendant, render it to the disadvantage of defendant to perform its contract, is no legal reason for releasing it from its obligations, where it appears that performance will benefit plaintiff. *Ib.*

Equity will not refuse specific performance of a contract having several years to run because performance requires the exercise of skill and judgment, and a continuous series of acts. *Ib.*

SPECIFIC PERFORMANCE—Continued.

A contract is to be judged as of the time it was made, and, if fair when made, the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. *Ib.*

See LACHES. *Wolf v. Great Falls Water Power and Town Site Co.*, 154.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCKHOLDER, SUIT BY.

While, as a rule, a stockholder, before bringing suit to redress his grievances suffered in such capacity, is required to request the governing body of the corporation to bring suit, yet such request is not necessary when the corporate management is within the control of the guilty party, but the complaint must allege with particularity the facts which excuse the lack of a request to the governing body. *Bell v. Montgomery Light Co.*, 434.

STREET.

See BOUNDARY. *Gump v. Sibley*, 22.

SUBROGATION.

Subrogation will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of the party who, on some sort of compulsion, discharges a demand against a common debtor. *Campbell v. Foster Home Assn.*, 472.

An attorney-in-fact, under a letter of attorney giving him a mere power to sell, executed a mortgage in the name of his principal, for \$7,500, upon land already covered by a mortgage of \$6,000. The mortgagee retained \$6,000, and paid off the first mortgage, paying over to the attorney the remaining \$1,500. *Held*, that the mortgagee, on the second mortgage being declared invalid, had no right to be subrogated to the position of the first mortgagee so as to recover the \$6,000 paid in extinguishment of the first mortgage. *Ib.*

SUPPORT AS CONSIDERATION FOR CONVEYANCE.

See CONFIDENTIAL RELATIONS. *Purvines v. Harrison*, 232.

TAXPAYER.

See INJUNCTION. *Avery v. Job*, 66; *Troutman v. McCleskey*, 587.

TRADE NAME.

A plaintiff in equity cannot be granted relief upon a claim to the exclusive use of a trade-mark, which contains a false representation, calculated to deceive the public as to the source of the article sold under the trade name. *Millbrae Co. v. Taylor*, 34.

TRADE NAME—Continued.

Mills, the owner of land known as "Millbrae Station," and the plaintiffs formed a partnership, to keep cows on said land and sell the milk therefrom, under the trade name of "Millbrae Dairy." The partnership was subsequently dissolved and an agreement made whereby the plaintiffs took the milk routes and Mills agreed to supply the plaintiffs with milk from the land, which milk the plaintiffs sold, conducting their business under the name of "Millbrae Dairy." A few years later, the plaintiffs terminated the agreement, procured milk from other places, organized a company under the title of the "Millbrae Company." Mills then commenced the business of selling his own milk, and used on his wagons and bills the name "Millbrae Dairy," and competed with the plaintiffs, who filed a bill against Mills and agents to enjoin them from the use of the name "Millbrae." *Held*, an injunction should not be granted, as the plaintiffs' own use of the name "Millbrae" was a fraud on the public. *Ib.*

John Forrest, a watchmaker in London, used to mark the words "John Forrest, London," on the goods made by him. After his death, in 1871, his administratrix sold his business and good-will to C. & Co., watchmakers in London. In 1874 C. & Co. granted to S. & Co., watchmakers in Liverpool, the sole right for seven years to put the words "John Forrest, London," on the watches they made. After the expiration of the license, C. & Co. inscribed "John Forrest, London," on very few, if any, of their watches. In 1890, they assigned all their estate for the benefit of creditors, and their trustees sold their business to X., who carried it on; and at the same time the trustee purported to assign to T., a watchmaker at Coventry, "the name, title and good-will of John Forrest, London." In an action by T. to restrain a rival watchmaker in Coventry from selling watches inscribed "John Forrest, London."

Held, that the action could not be maintained, for that, assuming C. & Co. acquired, in 1871, the right to inscribe "John Forrest, London," on their watches, they lost that right under the license to S. & Co., and never regained it;

Held, also, that even if anything was assigned to T. by the trustee of C. & Co., it was merely the right to use the name "John Forrest, London," unconnected with any business, and, being a mere assignment in gross, was invalid. *Thorneloe v. Hill*, 324.

TRESPASS.

Equity will not interfere to prevent a trespass where the legal rights of the parties have not been settled, or where it does not appear that the injury to the inheritance will be irreparable, or that the defendant is insolvent, but will leave them to their remedy at law. *Worthington v. Moon*, 77.

TRUST.

A promise by a debtor to pay his creditor out of specified property will not make the debtor a trustee of such property for the use of the creditor. *Hamilton v. Downer*, 522.

Casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust. *Ib.*

A devisee of property wrote letters to a creditor of the devisee's testate, recognizing the right of such creditor to resort to the devised property, expressing a desire to dispose of the property so as to pay the debt, and using other like expressions. *Held*, insufficient to manifest and prove a trust in the devised property, even though the creditor, because thereof, withheld the claim from probate until the statute had run. *Ib.*

ULTRA VIRES.

A mutual benefit order deposited money with a trust company, which thereafter became unable to repay it. The benefit order then assigned the fund to another in terms to secure a promissory note given for a loan, and the money thus obtained was disbursed in the usual course of business. *Held*, that as the effect of the assignment was to secure the debt, it was not *ultra vires*, conceding that the benefit order could not legally make a promissory note. *Commonwealth v. Suffolk Trust Co.*, 350.

The loan to secure which the assignment was given having been authorized at a meeting of the order, and the money obtained used for its benefit, equity will not, at the instance of the receiver of the insolvent depositary, forbid its payment to the assignee out of money in his hands, on the ground that the officers executing the assignment had no authority to do so. *Ib.*

UNCERTAINTY.

A bequest of a certain sum to an incorporated missionary society whose whole mission work is divided into two branches, domestic and foreign, is not rendered void for uncertainty of beneficiary or purposes by the addition of a direction to apply it to domestic missions, as such legacy is not to be considered as held upon any trust, but to be expended by the corporation in its regular domestic mission work, as distinguished from its foreign mission work. *Domestic and Foreign Missionary Society v. Gaither*, 113.

See SPECIFIC PERFORMANCE. *Waters v. Bew*, 183.

UNDUE INFLUENCE.

Where a father, who was seventy years old, and illiterate, joined with other of his children in an action to set aside a deed to two of his sons on the ground of undue influence, and, after the case was dismissed as to him on his own motion, moved to set aside the dismissal on an affidavit that he had been persuaded to dis-

UNDUE INFLUENCE—*(Continued).*

miss it by his sons, the dismissal should have been set aside.

Smith v. Snowden, 251.

See **BURDEN OF PROOF.** *Taylor v. Crockett*, 205.

UNILATERAL CONTRACT.

See **SPECIFIC PERFORMANCE.** *Waters v. Bew*, 183.

VOLUNTARY DEED.

Voluntary agreements are not enforceable in courts, even though under seal. *Rountree v. Smith*, 365.

So long as the purpose of a grantor to make a voluntary conveyance is *in fieri*, the grantor may, with or without cause, at any time, recede from such purpose. *Ib.*

If such a deed is given to the grantee with the intention it shall not take effect unless security respecting certain matters is given, the gift becomes executed only upon the offering and accepting of such security. *Ib.*

Permission to record such a deed, if given by the grantor only in furtherance of an ultimate purpose to make the gift provided the grantee does certain things, will not prevent the giver from withdrawing the gift at any time before the donee has performed. *Ib.*

WASTE OF PUBLIC FUNDS.

See **INJUNCTION.** *Avery v. Job*, 66.

WATER-COURSE.

A body of water having a bed, bank and current, is a natural water-course, although, at times, the water may be exhausted and the course be dry. *Rigney v. Tacoma Light and Water Co. et al.*, 47.

A natural water-course does not lose its character as such by the fact that its channel is artificially deepened for the purpose of drainage. *Ib.*

When a stream spreads out into a pond-like sheet, with currents, it still remains a water-course. *Ib.*

A riparian owner has no right to divert a stream permanently from its natural course, and the purpose to which he devotes the water makes no difference in the application of the rule. *Ib.*

The right of a riparian owner to the flow of water is annexed to the soil, not as a mere easement or appurtenance, but as part and parcel of it. *Ib.*

When a continued diversion of a water-course is threatened, equity will interfere by injunction to preserve the rights of the riparian owner therein. *Ib.*

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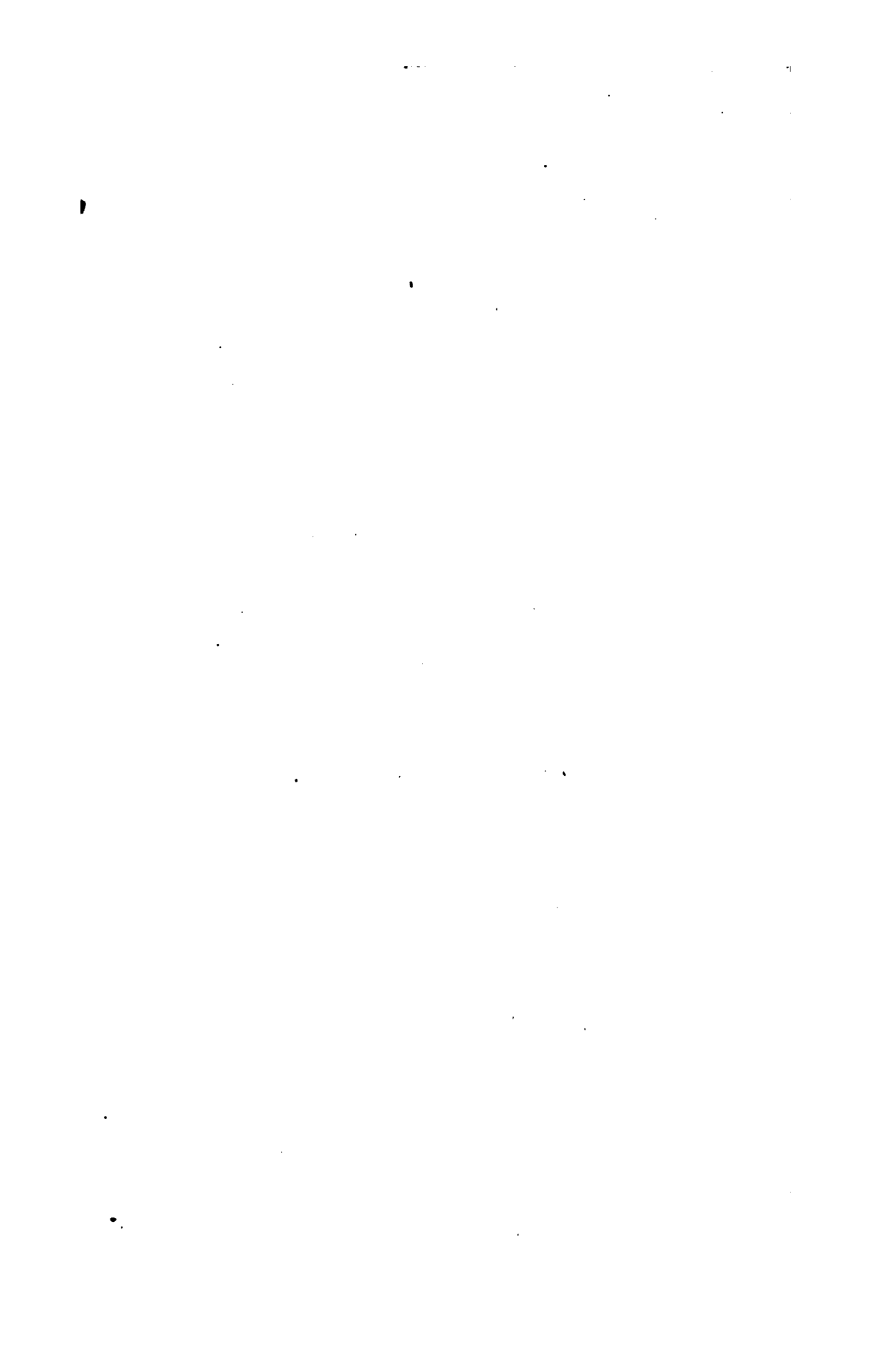
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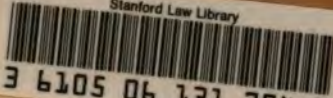
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